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FRED E. DILLON and CATHERINE A. DILLON, his wife, Appellees, v. CHICAGO PARK DISTRICT, a municipal corporation, JAMES H. GATELY, WILLIAM McFETRIDGE, JACOB M. ARVEY, JOSEPH W. CREMIN, JOHN LEVIN, CONSOLIDATED CONCESSIONS, INC., an Illinois corporation, Appellants.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Fred E. Dillon and Catherine A. Dillon, his wife, on behalf of themselves and others as taxpayers, filed a complaint in chancery against the Chicago Park District, a municipal corporation, the five Commissioners thereof and the Consolidated Concessions, Inc., a corporation, praying for an injunction to restrain the municipal corporation and its commissioners or other representatives from executing and delivering any contract pursuant to an award made January 27, 1948 to Consolidated Concessions, Inc., and that the latter corporation be restrained from executing any contract with the Park District, and from entering upon the performance of any contract by virtue of the award. Plaintiffs amended their complaint by designating the provisions of the law asserted to have been violated and by deleting a charge that one of the Commissioners owned the corporation to which the contract had been awarded. Plaintiffs state that they were copartners in the Central States Concessionaires and had presented a bid for the concessions in Zones West, South

and Central of the Chicago Park District. They claimed a fraud against themselves and other taxpayers similarly situated, which would increase taxes. Answers filed by the various defendants denied the material allegations of the complaint. Consolidated Concessions, Inc., denied any basis for a taxpayers' action. The case was heard by the chancellor and a decree entered in substantial conformity with the prayer of the complaint. Defendants appealed. One set of briefs has been filed by the municipal corporation and the Commissioners, and another by Consolidated Concessions, Inc.

In their brief the Park District and the Commissioners advance 7 points, the first 5 of which, in order, urge that the decree should be reversed because (1) in the absence of a statutory or other provision of law, the Park District is not required to award concession contracts in response to competitive bidding; (2) that there is no statutory or other provision of law requiring the letting of concession contracts in response to competitive bidding; (3) that in the absence of a statutory or other provision requiring competitive bidding the advertising for bids and taking of bids does not bind the Park District, nor is it required in such case to observe the legal requirements with regard to lettin of contracts pursuant to competitive bids and may disregard such bids and negotiate a contract; (4) that where there is no ambiguity or doubt, the court cannot resort to practical or contemporaneous construction by the parties of statutes

or ordinances; and (5) that the doctrine of contemporaneous construction only applies where there is a contemporaneous, long, uniform and practical construction. In their brief plaintiffs assert that they are in accord with appellants' proposals 1 to 5, both inclusive. In point 6 defendants assert that plaintiffs failed to prove the existence of the conspiracy and fraud charged in their complaint, while the evidence conclusively shows that the officials of the Park District acted in good faith, and in point 7 that in the absence of fraud the court is without power to substitute its judgment for that of the Board of Commissioners of the Park District.

The brief filed by the Consolidated Concessions, Inc., maintains (1) that the case has no basis as a taxpayers' action; (2) that neither fraud or conspiracy is involved; (3) that the Park District is under no duty to proceed by bids with respect to concession contracts; and (4) that the chancellor had no authority to base his decree on his judgment of fairness, or upon any other ground than proof of fraud, and that there was no unfairness. Plaintiffs state that as abstract propositions of law point 3 made by Consolidated Concessions, Inc., and points 1, 2, 3, 4 and 5 of the other defendants' briefs are substantially correct and limit their brief and argument to answering points 6 and 7 of the brief of the Park District and the Commissioners, and point 4 of Consolidated Concession's brief and argument. Plaintiffs assert that Consolidated Concessions, Inc. is not in a position to urge that they cannot maintain a taxpayers'

suit because that proposition was not raised in the trial court.

The chancellor found that there is no requirement that the Park District advertise for bids in letting concession contracts; that there is no binding custom based on uniform practice requiring competitive bids for concessions; and that neither the Park District, the Commissioners thereof, or any officials thereof were guilty of fraud or conspiracy in connection with the subject matter of the suit. It thus appears that the chancellor found in favor of defendants on the issues submitted, except on point 7 of the Park District brief and point 4 of the Consolidated Concessions's brief. Nevertheless, the court entered its decree in favor of plaintiffs, granting the relief prayed.

Plaintiffs, doing business as Central States Concessionaires, in 1941 were awarded a contract without competitive bidding by the Chicago Park District for the exclusive right to occupy certain premises designated West, South and Central Zones in that district, and to operate therein certain concessions for a period of 5-1/2 years. These concessions consisted of the right to serve and dispense food, render certain services, etc., in 9 parks located in the named zones. This contract was twice extended without competitive bidding and finally expired on November 30, 1947. In October, 1947 the Park District, not desiring to grant a further extension to plaintiffs, decided to advertise for and receive bids and

enter into a new concessions contract. The general superintendent was instructed by the Board of Commissioners to prepare forms of bids and specifications for the named zones and the North Zone as well. These were prepared by the legal department of the Park District. The District duly advertised for the reception of bids on November 13, 1947. Sealed bids were receivable until 10:00 a.m. on December 16, 1947. At 10:00 a.m. on that day at a public meeting of the board the bids were publicly opened and read aloud. There were 8 bidders. Also present at that meeting were several of the bidders, newspaper men and some of the general public. At that meeting the bids were referred to the general superintendent for tabulation and report. The formal meeting of the board was then adjourned.

The Commissioners proceeded to their executive office where they convened as a Committee of the Whole. The president appointed a committee consisting of George T. Donoghue, General Superintendent, Philip A. Lozowick, General Attorney, and Daniel L. Flaherty, Assistant General Superintendent, to canvass the bids and interview the bidders. The tabulation shows that the bids consisted of what are designated as the "Main Proposal" and the "Alternate Proposal." The main proposal specified a lump sum for a period of 5 years, payable in monthly installments, with the additional provision that "in any one calendar year when 15% of the total gross receipts equals the aggregate of 12 monthly installments, the concessionaire, during the remaining portion of said calendar year and in addition to said monthly installments, shall pay a sum

equal to 15% of the total gross receipts realized thereafter." The alternate proposal provides for a flat payment without any percentage provision. Between December 22 and 24, 1947, the committee appointed to canvass the bids and interview bidders proceeded with their assigned duties. All except one of the bidders appeared before it. Each bidder, in advance of the interview, was requested by letter to give information as to qualifications to operate the concessions in question. Some of the bidders did not reply in writing. All members of the committee were present at and participated in all of these interviews. As a result of this canvass of the bids and interviews the committee decided unanimously that the bids were unsatisfactory and to recommend to the Board of Commissioners that all bids be rejected. On January 19, 1948 the committee reported to the Commissioners, sitting as a Committee of the Whole. A copy of the tabulation of the bids had been submitted to each of the Commissioners in advance of that meeting. The session lasted 4 or 5 hours. All of the Commissioners and all of the members of the canvassing committee were in attendance and participated in the discussion. Mr. Donoghue reported for the latter committee. Each bid and bidder was considered separately. The Commissioners then decided to reject all bids.

The report of the canvassing committee on the respective bids is summarized: (1) Central States (Dillon): This concessionaire furnished a poor quality of food and

service during the preceding year; it failed to clean up after functions; its employees were overzealous and were guilty of incivility toward patrons and failed to obey orders; the concessionaire neglected to follow out suggestions and to improve services or change undesirable methods; complaints came in from the public to various Commissioners voicing criticisms of service; specific instances illustrating these shortcomings were narrated in the committee report and discussed by canvassing committee members and by the Commissioners. (2) C. & R. Refreshment Services (Napolitano): The principal member of this concern was handicapped by illness; it was doubted whether he had the physical capacity or experience to carry out the contract; if the contract were awarded this bidder, his son, a practicing attorney, would be obliged to perform the contract, and doubt was expressed as to whether he had the necessary experience to handle the project. (3) John A. Whalen Co.: This company had in prior years a concession contract but its services had proved to be unsatisfactory. (4) Frank G. Washam: His experience in the concession business had been very limited. He "showed no ability to get the equipment necessary to run it," while he had made no preparation to operate the concession. He failed to deposit a certified check with his bid, which the specifications required. (5) Illinois Sports Service: Experienced in handling concessions, but its representative stated that "they would not make any minimum guarantee near the amount of $525,000." Their bid names a minimum guarantee of only $200,000, and they stated that

in no event would they make a minimum guarantee in excess of $300,000. (6) Edward M. O'Leary. He had a very limited experience in the concession field. He owned and operated a tavern and restaurant and "gave no promise of being able to render the kind of service the Commissioners had indicated they wanted." (7) Hill Industries: This bidder was not requested to appear before the canvassing committee since it did not deposit a certified check as required by the specifications. (8) Consolidated Concessions, Inc.: This was a newly formed company, having been incorporated on September 24, 1947. The three principals were Ashley Ricketts, William Burns and William Colbert. Ricketts had many years of experience in the restaurant business "from the ground up and rounding out his career as a manager." He had a knowledge of food and was trained in handling a large number of people in a comparatively short time. He had evidently made a survey of the zones in connection with his bid. He proposed improvements in the service, such as more attractive stands and booths, a wider coverage of the various parks; he had proposed the installation of mobile units to bring provisions to the people, and suggested that past coverage had been inadequate. He told the committee at the preliminary interview that he had very little equipment at the time but that he knew where he could get everything he needed, except rowboats. He informed the canvassing committee that his company had $40,000 in liquid assets and additional assets of $86,000. Superintendent Donoghue

said that he "felt they are reliable and they gave promise of being able to give the services that the Commissioners had said repeatedly they wanted to give." It was also reported to the Commissioners that this company had submitted a guaranteed minimum of only $150,000 for the five-year term and it was the only bidder which had not submitted a written statement. (9) Cafe Brauer: This bidder had had the concessions in the North Zone for a period of 30 to 40 years. The bidders for the other zones had also bid on the North Zone. Bids on all zones were at first considered together. There was talk of the committee making one contract for all zones. The General Superintendent, however, reported that Brauer had rendered satisfactory service and that any complaints made were without foundation. He recommended that Brauer be awarded the concession contract for the North Zone.

At their regular meeting of January 27, 1948, Brauer was awarded the contract for the North Zone. The Commissioners at the meeting of the Committee of the Whole on January 19, 1948 advised the canvassing committee that if it would formulate a written report and recommendation to reject all bids on the West, South and Central Zones as being unsatisfactory, the Commissioners at the next regular meeting would approve such a report and recommendation. A written report to that effect dated January 23, 1948 was prepared and signed by the canvassing committee and was later signed by the individual Commissioners. At the same meeting, after the Commissioners had stated their approval of the committee's recommendation and

report, the General Superintendent raised the question as to what would be the next step. The committee was then directed to attempt the negotiation of a contract with Consolidated Concessions, Inc. On the day of the meeting, January 19, 1948, the Commissioners gave additional instructions to the committee. The terms of the original specifications excluded from the concessions the Ringling Bros. Barnum & Bailey Circus, and also provided for the furnishing of a minimum of 250 rowboats. The Commissioners' additional instructions called for a modification of these two provisions. As to the circus concession the Commissioners decided to include the circus.

It developed in the session of January 19, 1948 that on previous occasions when the circus management had handled this concession, its service and the food and drinks sold had proved entirely unsatisfactory and that numerous complaints had been registered with the Commissioners. It was stated that other users of the park premises had not been permitted to handle their own concessions. The Commissioners came to the conclusion, as testified by one of them, that "We determined that never again would we permit a contract where we would give any one a right to operate a concession without supervisory authority on the part of the Commission, and we don't exclude any one else." It developed at the canvassing committee's interview with Mr. Dillon that he had been using only 150 rowboats in the West, South and Central Zones. The committee advised the Commissioners

that in its opinion a minimum of 150 and a maximum of 250 would suffice. The Commissioners instructed the committee to use its own judgment on the number of rowboats. As the Consolidated Concessions, Inc. "Main Proposal" bid was only $150,000, the committee was instructed by the Commissioners at the meeting of January 19, 1948 that in its negotiations with that corporation to get "at least the same compensation we had received there before from the operation of these concessions, or, in lieu of that, the amount bid made by the Central States." The amount theretofore received from the operation of this concession from the Central States was between $104,000 and $109,000 for the year 1947. Central States bid a minimum guarantee of $525,000 for 5 years, or $105,000 a year.

Shortly after January 19, 1948 the canvassing committee resumed its negotiations with Consolidated Concessions, Inc. As a result of a series of interviews with representatives of that company the canvassing committee negotiated a contract, the terms of which are the same as those contained in the proposed specifications and contract upon which bids were received, with these exceptions: (1) they included the Ringling Bros. Barnum & Bailey Circus, when, as, and if that circus came to Chicago and occupied park premises; and (2) the number of rowboats was fixed at a minimum of 150 and a maximum of 250. The contract was presented to the Commissioners sitting as a Committee of the Whole on January 27, 1948, at a morning session, accompanied by a recommendation of

the committee that the contract for the West, Central and South Zones be awarded to Consolidated Concessions, Inc. At a formal meeting of the Commissioners on the afternoon of that day all of the bids of the West, Central and South Zones were rejected, the recommended contract with Consolidated Concessions, Inc. was approved and a concession contract was awarded Cafe Brauer, the high bidder for the North Zone, as recommended by the canvassing committee.

In addition to the findings in favor of defendants hereinbefore mentioned, the chancellor found that "the changes made as aforesaid in the proposed contract resulted in substantial benefit to the concessionaire contractor; that no opportunity was given to higher bidders to be heard in later negotiations with the Chicago Park District, which action favored Consolidated Concessions, Inc. and was unfair to other bidders and to the public; that the contract involved is with a public body, not with a private firm or individual; that patriotic duties and ethics demand that a citizen should deal more fairly with his Government than with private business; that no explanation was offered as to why Consolidated Concessions, Inc. bid $150,000 and shortly thereafter raised its bid to $525,000"; and "that a public contract to be valid in a court of chancery cannot emanate from such a beginning."

Plaintiffs, arguing that equity will act to prevent a breach of trust on the part of public officials, state that the facts disclose that the Commissioners,

(it must be presumed) in order to obtain the most advantageous contract, devoted considerable time, thought and expense to the preparation of the specifications for bidders; that as a result of public advertisements seven bids were received, reviewed and rejected; that after "this preliminary shadow boxing" the Commissioners completely reversed their course of conduct and "in a star chamber hearing" decided that in one way or another, "the new, untried, inexperienced corporation, Consolidated Concessions, Inc." would be awarded the contract; that this corporation "admittedly in the control of a 34 year old young man, who had no concession experience, no equipment, no statement prepared by a certified public accountant, no references, and whose business office was the home of its managing officer and president, Ashley Ricketts, had become the 'favorite son'"; that knowledge of "extraordinary lack of qualifications" was supplied to the park committee by the corporation itself; that receiving this information and apparently disregarding it, Mr. Donoghue and the members of his committee requested the corporation to increase its minimum bid figure from $150,000 to $525,000; that this the corporation agreed to do only after the Park District reduced the requirements of the original contract's specifications as to the number of rowboats "this favored corporation would be required to purchase from its limited bank account, and in addition, increased the opportunities for making profit by including the right to the favored corporation to operate the concession at the Ringling Bros. Barnum &

Bailey Circuit"; and that "there was also $10,000 or $15,000 worth of cleaning the Park District agreed to do." Plaintiff argues further that "rowboats cost money"; that Consolidated Concessions, Inc. had little; that the burden was reduced by permitting the corporation to keep its working capital intact; that fear of a substantial increased minimum bid was easily overcome; that the committee showed "its books" to the appellant contractor and explained that with the additional $10,000 or $15,000 in cleaning expenses, to be saved under the new contract, together with the opportunity for increased profits at the circus, everything would work out for the corporation; that this conduct shows a complete disregard of public duty; that the procedure adopted amounts to first discovering "what the traffic will bear by sealed bids, then throwing them out and working with the 'favorite son'"; that the procedure goes against all principles of awarding contracts developed over the years for the protection of the taxpayers; that it is a vicious attempt to take advantage of what was through poor draftsmanship omitted as a safeguard when the Chicago Park District code was approved; that with all these inducements and explanations the bidder agreed to meet the rejected bid of Central States Concessionaires of $525,000, which was the highest bid taken; and that the record is silent as to any attempt being made to determine whether other bidders would have increased their minimum bid in view of the changes in the specifications that the Park District was willing to make

and that new bidders were not solicited.

Plaintiffs urge that this method of obtaining information is a radical departure and a flagrant disregard of the previous careful attempt to obtain what would be to the best advantage of the taxpayers; that a demonstration that in the opinion of the Commissioners, the matter of whether a minimum bid should be $150,000, $300,000 or $525,000, is a vital matter looked upon by the persons familiar with the concessions business as something that will be harmful to them in the event conditions prevent them from obtaining sufficient income to warrant the payment of the minimum bid; and that the course pursued was not the usual action of public officials in negotiating a contract. Calling attention to the fact that one of the Commissioners stated: "Now, that might mean we lose some revenue from Ringling Bros. next year, but we are not operating the Park District for profit or for revenue primarily," plaintiffs assert that they, plaintiffs, would like to know if the park concessions are to be parcelled out at the whim of the Commissioners with no regard to the burdens imposed on the taxpayers. Plaintiffs state that their position is that regardless of statute, ordinance, custom or contemporaneous construction, when the evidence discloses a failure on the part of public officials to carry out their trust functions by favoring one person over another at the expense of the taxpayers, equity will enjoin such conduct and prevent the irreparable damage that the taxpayers will suffer, and

that the cases cited by defendants to the effect that the court will not interfere with the decisions of public bodies in the absence of fraud, also discuss favoritism and bad faith. Plaintiffs say that the Consolidated Concessions, Inc. was given "substantial benefit," that it was "favored," and that the actions of the Park District were "unfair." Citing People v. Parker, 231 Ill. 478, and Mills v. Forest Preserve Dist., 345 Ill. 503, plaintiffs state that an examination of the facts should lead to an affirmance of the decree.

In the absence of fraud the court is without power to substitute its judgment for that of the Board of Commissioners of the Park District. When the statute vests a discretion in a municipal corporation to determine a question, it is not the province of the court to determine and control that discretion. The courts cannot interfere, in the absence of fraud, with the exercise of the official discretion of the Commissioners in awarding contracts. Johnson v. Sanitary District, 163 Ill. 285; Hallett v. City of Elgin, 254 Ill. 343; and People v. Kent, 160 Ill. 655. In the Hallett case, a bill to restrain the city from awarding a contract, the court said (349):

> "The burden of proof was upon the complainants in the bill to overcome by proof the presumption of law which obtains in favor of the good faith of the board of local improvements in awarding the contract, by showing that they exceeded their jurisdiction, or their action in awarding the contract was vitiated by fraud, or that the award was arbitrarily made or was the result of favoritism."

Fraud is never presumed. It must be alleged and proved. The chancellor found that there was no fraud. This finding is borne out by the record. Plaintiffs do not assign

or argue any cross errors in the findings of the chancellor.

As there was no evidence or finding of fraud, plaintiffs seek to sustain the decree on the theory of "favoritism" and "bad faith." In our opinion there is no basis either in the pleadings or the evidence to sustain the findings that the action of the defendants "favored" Consolidated Concessions, Inc., and "was unfair to other bidders and to the public." The extensive summary of the facts shows the reasons for the rejection of 8 of the 9 bidders, which were (1) unsatisfactory service in the performance of concessions contracts with the Park District in the past; (2) physical incapacity of the bidder to carry out the proposed contract; (3) failure to deposit a certified check with the bid; (4) refusal to increase a minimum bid; and (5) lack of ability to carry out the proposed concession contract. There was a thorough screening of the bids and bidders. It was within the discretion of the board to decide whether any good purpose would be served by asking that further bids be submitted. Advertisement for bids was given wide circulation. In our opinion the commission was not obliged to again solicit bids in order to escape a charge of bad faith or favoritism. The commission had a discretion to decide that further solicitation of bids would prove barren of results in view of the wide solicitation made in the advertisement for bids. There is no evidence that the books of the Park District were shown to the representatives of Consolidated Concessions, Inc., nor is there any evidence

tending to establish any assurance by the Park District that "under the new contract, together with the opportunity for increased profits at the circus, everything would work out for the corporation." There was no proof to support the "favored son" theory. There was no departure by the commission from any uniform practice in advertising for bids, or in rejecting all bids and then negotiating a contract with one of the bidders. In the years preceding 1947 the plaintiffs were awarded contracts without bidding. They were also awarded contracts where bids were received and rejected and as a result of subsequent negotiations. The process followed in the case at bar was not a departure from any uniform practice.

The grounds which plaintiffs urge against the contract with Consolidated Concessions, Inc., are: (1) increasing the minimum guarantee from $150,000 to $525,000; (2) including the circus in the concessions contract; (3) reducing the minimum number of rowboats from 250 to 150; and (4) the alleged elimination of the obligation to clean certain areas. As to increasing the minimum from $150,000 to $525,000, the evidence shows that Consolidated Concessions, Inc. had made the best impression upon the canvassing committee and the Commissioners. Since all the remaining bids and bidders for the zones in question were eliminated after hearings before the canvassing committee and the Commissioners, on the grounds shown by the record, the Commissioners were clearly within their rights in negotiating with Consolidated Concessions, Inc. to raise its minimum bid.

As a result that bid was raised to $525,000. In this there was neither favoritism or bad faith. It was the function of the Commissioners to pass judgment on the information before it.

Turning to the subject of the inclusion of the circus, it appears that should the circus come, the Park District would share in the profits derived from the concession, and that one year Dillon had been paid by the Park District to oversee that concession because the circus had managed the concession in an unsatisfactory manner. The inclusion of the circus, should it come to the park property, was a matter to be determined by the Commissioners. The matter of the minimum number of rowboats was also a matter for the determination of the Commissioners. They had the right under the contract to require Consolidated Concessions, Inc. to provide 250 rowboats. Dillon, who had been taught by experience over a period of years, had found 150 to be adequate and equal to the demand. As to the elimination of cleaning, it appears that the specifications calling for bids are exactly the same as those contained in the contract with Consolidated Concessions, Inc. As to the statement quoting one of the Commissioners as saying, "We are not operating the Park District for revenue primarily," we are of the opinion that this statement is not subject to criticism. We do not believe that anyone will maintain that the parks are operated primarily for revenue.

From a careful consideration of the record and the cases cited by the parties, we find that there was no

breach of trust on the part of the Commissioners and other officers of the Chicago Park District. The record shows that the Commissioners endeavored conscientiously and honestly to carry out their duties. One of their duties was the awarding of contracts for the operation of the concessions in the 4 zones. In fulfilling that duty they interviewed many persons, carefully considered all the elements involved, after which they decided to award the contract to Consolidated Concessions, Inc. There is no basis for the findings that the Commissioners "favored" anyone, or that the award to Consolidated Concessions, Inc. was "unfair to other bidders and to the public." There is no support in the record for the charge that the selection of Consolidated Concessions, Inc. was the result of arbitrary favor on the part of the board. We agree with defendants that the award of the contract and the changes adopted were the result of investigation and the consideration of reports and facts within the knowledge of the Commissioners and the board staff. The board's action was the result of the exercise of its discretion.

For the reasons stated, the decree of the Superior Court of Cook County is reversed and the cause remanded with directions to dismiss the complaint, as amended, for want of equity.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS

KILEY, J., and
LEWE, J., CONCUR

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A.D.1949

General No. 9619 Agenda No. 6

3 37 I.A. 98

Fred I. Evans, Plaintiff-Appellant,	)	Appeal from
-vs-	)	Circuit Court of
Paul F. Beich Company, a Corporation, Defendant-Appellee.	)	McLean County

DADY, P.J.

This suit is based on an alleged breach by defendant-appellee Paul F. Beich Company, a Corporation, of an alleged contract of employment of plaintiff-appellant Fred I. Evans, as a salesman for the defendant.

At the conclusion of all of the evidence offered by plaintiff and by defendant the trial court, on motion of defendant, instructed the jury to find the issues for defendant. The court then entered judgment on such verdict in favor of defendant and against plaintiff.

The plaintiff appeals from the entry of such judgment.

The material issues made by the pleadings are whether or not plaintiff was duly employed as a salesman by defendant through its agent Frank Morris, and whether or not such employment was again duly affirmed by defendant's agent Charles I. O'Malley.

General No. 9819

Fred I. Evans, Plaintiff-Appellant,	
-vs-	
Paul K. Beich Company, a Corporation, Defendant-Appellee.	

DADY, P.J.

This suit is based on an alleged breach of contract-appellee Paul K. Beich Company, a corporation, and by reason contract of employment of plaintiff-appellant Fred I. Evans, as a salesman for the defendant.

At the conclusion of all of the evidence offered by plaintiff and by defendant the trial court, on motion of defendant, instructed the jury to find the issues for defendant. The court then entered judgment on such verdict in favor of defendant and against plaintiff.

The plaintiff appeals from the entry of such judgment.

The material issue made by the pleadings was whether or not plaintiff was duly employed as a salesman by defendant through its agent Frank Morris, and whether or not such employment was again duly affirmed by defendant's agent Charles I. O'Malley.

In passing on a motion for a directed verdict the trial court cannot weigh the evidence, but the rule is that if there is in the record evidence which, standing alone, fairly tends to prove the material allegations of the complaint, then such motion should be denied. If there is no evidence tending to prove the material allegations of the complaint, or if there is but a mere scintilla of evidence in support of such material allegations, then such motion should be allowed. (Johnson v. Barnett, [illegible] Ill. [illegible].) Whether there is any evidence fairly tending to prove the material allegations of the complaint is a question of law. (Dean v. City of Peru, 343 Ill. 36.)

Therefore our statement of facts will cover such and only such as we consider favorable to the plaintiff's case.

In July, 1945, Frank Morris was either defendant's "Educational Manager" or "Territory Manager" for the entire state of Illinois.

Plaintiff testified that he first met Morris in July, 1945, in the home of a mutual friend, Russell Williams, in Lancaster, O., ~~that at the time [illegible] of interest,~~ that Morris then told him of the educational work necessary for the selling of defendant's cosmetic products, and Morris had with him literature and advertising material pertaining to the sale of defendant's products, and radio work to put on the air, that after some discussion Morris said to plaintiff, "you will fill the bill," and "you can consider yourself hired for the Paul F. Beich Company," and the wages settled on were $45 per week, and that Morris said he would send a formal application blank which plaintiff was to fill out and send back to Morris because Morris wanted to

handle the matter and would get it through later, but that at that time no date was set for the plaintiff to start work.

Plaintiff further testified that [illegible] Morris [illegible] home about a week later and was then told by Morris that his starting date would be September 15, 1945, and that he was to report at New Orleans, La, that at that time the plaintiff owned a home in Akron, Ohio, and, on Morris' advice, he sold [illegible] house trailer, and that Morris said the [illegible] expense of moving plaintiff's furniture to New Orleans, [illegible] and the middle of July, 1945, plaintiff received a letter, [illegible] letter head, from Morris dated July 13, 1945, in which [illegible] application blank for employment by [illegible], which letter stated that Morris would like [illegible] to fill out the blank and send it to Morris in Cleveland, O., and further stated, "[illegible] for us to start men on these jobs [illegible]," that plaintiff filled out and returned such blank to Morris, [illegible] Morris in September, 1945, at which time [illegible] had been accepted but that there had been a change of plans and plaintiff was to work out of Indianapolis, Ind., that [illegible] took his children out of school and moved to Indianapolis, where he stayed until early in December, 1945, that plaintiff thereafter kept in contract with Morris by sending telegrams to Morris, and waited to hear from Morris but received no earlier reply from Morris, that sometime later, apparently in January, 1946, plaintiff went to the Chicago branch office of defendant in an unsuccessful attempt to contact Morris, and that thereafter, in January, 1946, plaintiff went to the home office of defendant in Bloomington, Illinois, and there talked with one Charles O'Malley.

handle the matter and would get it through Washington, but just at that time no date was set for the plaintiff to start work.

Plaintiff further testified that he got word that it was to have been about a week later and was then told by Morris that the matter would be September 15, 1942. Accordingly he was to come out of New Orleans, La. that at that time the plaintiff moved to Toledo, Ohio, and, on careful notice, he did not have not enough money to travel, and that Morris said the matter would be the matter of moving plaintiff's furniture to Toledo. At approximately, upon the middle of July, 1942, plaintiff received a letter, [illegible] head, from Morris later that July 7th, 1942, [illegible] application blank for employment by "Morris", which Morris wanted that Morris would like them to fill out the blank and mail it to Morris in Cleveland, O., as Further stated, "We seem to it is possible for us to start you on June 15th you will hear from me." That plaintiff filled out and returned such blank to Morris, that plaintiff left New Orleans in September, 1942, at which time stated that plaintiff he had been assured but that there had been a change of plans and plaintiff was to work out of Lockbourne, Ohio. That plaintiff then took his children out of school and moved to Lockbourne. There he stayed until early in December, 1942, that plaintiff thereafter had in contact with Morris by sending telegrams to Morris, and failed to hear from Morris but received no word or reply from Morris, that accounts later, apparently in January, 1943, plaintiff went to the Chicago Branch office of defendant in an unsuccessful attempt to contact Morris, and that thereafter, in January, 1943, plaintiff went to the home office of defendant in Bloomington, Illinois, and there talked with one Sherlen O'Malley.

The undisputed proofs, offered by defendant, show that at that time O'Malley was and since December, 1944, has been "Sales Manager" of defendant.

Plaintiff further testified that he then told O'Malley of the above transactions with Morris, that O'Malley told plaintiff that he was surprised and upset at plaintiff's misfortune, and said, "I don't understand why Morris should do things like that, he is one of our top men, in fact he is our top man," that "O'Malley's reaction to me made it quite clear it was the first time he knew about it," and O'Malley told plaintiff they had "no information about the fact Morris had talked to plaintiff about becoming an employee of defendant," that O'Malley then asked his secretary to see if plaintiff's application was on file, but that no such application was found and there was apparently no correspondence between defendant and Morris as to the plaintiff, that O'Malley then "phoned" to Morris, who was then in Tennessee, and told Morris what plaintiff had said, that, by means of an extension telephone, a three-way conversation then took place between plaintiff and Morris and O'Malley, that O'Malley then told Morris that Evans was there and asked Morris what on earth he was doing and reprimanded Morris for what he had done, and told Morris he felt Morris was wrong in giving Evans a starting date and letting Evans alone in Indianapolis waiting all this time, that Morris said, "I didn't know where he was or I would have gotten in touch with him," that O'Malley then said to Morris, "Evans is on the 'phone, * * * let's get this thing straightened out the best we know how," that Morris then denied that he had set a date for plaintiff to start work, that Morris then asked O'Malley if he "should continue to gather these men together," and O'Malley replied, "Yes, get them

The undisputed proofs, offered by defendants, [illegible] that Miss O'Malley was not alone because, then, her [illegible] testimony of defendant.

Plaintiff's former testified that he then said [illegible] the above transactions with Morris, [illegible] he was surprised and [illegible] "I don't understand why Morris [illegible] Miss O'Malley, he is one of our top men. In fact he is our top man." Then "I believe a question to be made is quite clear if was the client who [illegible] and O'Malley said [illegible] they had [illegible] Morris had failed to clearly show [illegible] defendant," that O'Malley [illegible] plaintiff's application was [illegible] was found and there was [illegible] and Morris as to the plaintiff, that O'Malley then turned to Morris, who was then in Tennessee, and told Morris "that plaintiff was said, that, by means of an extension telephone, a three-way conversation then took place between plaintiff and Morris and O'Malley. Then O'Malley then told Morris that there was [illegible] on earth he was doing and improperly [illegible] and told Morris he felt Morris was wrong in giving Wynn a meeting and letting Wynn alone in Indianapolis without all this time, that Morris said, "I didn't know where he was or I would've notified in touch with him," that O'Malley then said to Morris, "Wynn is on the 'phone, and he feels not this time either straightened out the best we know how," that Morris then learned that he had not a date for plaintiff to start work, that Morris then asked O'Malley if he "should continue to gather these men together," and O'Malley replied, "Yes, get them

together but for Heaven's sake, don't give any more starting dates," that O'Malley then said to Morris, "If you want Evans, all right, just say so," and Morris said, "I do," and O'Malley then said to Morris, "If you don't want him I will take a re[illegible] at this end," that after such 'phone conversation O'Malley said to plaintiff, "What did Frank arrange with you for salary," and plaintiff told O'Malley and O'Malley said, "That is about the figure we put the junior salesmen on. We start them at that figure," that O'Malley also said, "I can't understand why [illegible] because he is usually a good operator, * * * but I will be fair with you, I feel that you have suffered and that if you did take it to court you would possibly have a verdict in your favor, and I feel it would be happier all around if you became a member of the family of [illegible]," that O'Malley then introduced plaintiff to Mr. [illegible] and Mr. Church with the remark, "this is the man you have to be nice to because when you are out on the road and are short of money this is the fellow that advances it to you," that O'Malley then told the plaintiff that if he would forego a suit at law O'Malley would put the plaintiff on the payroll as soon as there was a ten per cent increase in the sugar ration of the defendant, that O'Malley then gave plaintiff a small booklet of the defendant.

This booklet outlined the selling policy of the defendant and the problems for the period when salesmen would be engaged and when competition was restored. It stated among other things that the "Sales Promotional Manager is in charge of engaging and training new junior salesmen."

Under date of April 1, 1946, the defendant company by O'Malley, "Sales Manager," wrote a letter to the plaintiff which so far as is material, stated that there was practically no possibility of any kind that sugar rationing would be completely lifted until the

together but for Gerard's sake, hard give up [illegible] [illegible]
that O'Malley then said to Gerard, "If you were [illegible] [illegible]
just say so," and [illegible] "I [illegible]
[illegible], "If you [illegible] [illegible]
that action such [illegible] [illegible]
"What [illegible] [illegible] [illegible]
O'Malley and [illegible] said, "[illegible]
junior [illegible]
also said, "I [illegible]
is usually a good [illegible]
feel that you [illegible]
you would [illegible] would be happier
all around if you [illegible]
that O'Malley then [illegible]
with the remark, "[illegible]
when you are out on the [illegible]
fellow that [illegible]
that if he would [illegible]
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senior section of the department, that O'Malley then gave [illegible]
small [illegible] of the department.

This incident [illegible] the [illegible] policy of the [illegible]
the problem for the period from [illegible] in [illegible]
[illegible] was [illegible]. It stated among other things that the
"Sales Promotional Manager is in charge of [illegible] and [illegible]
junior salesmen."

Under date of April 1, 1944, the defendant company by O'Malley,
"Sales Manager," wrote a letter to the plaintiff which so far as
in material, stated that there was practically no possibility of
any kind that [illegible] would be completely lifted until the

spring of 1947, and that defendant would not be able to use salesmen until it was necessary to sell goods "and we are sorry that all plans we made here at the plant for our country-wide operations are necessarily being so long delayed."

Thereafter and on June 18, 1947, the plaintiff commenced this suit.

When called by the plaintiff as an adverse witness, O'Malley testified that Morris "is still employed by our company. I think he is now on his way to court. I didn't see but talked to him last Sunday." However, Morris did not testify or appear and his absence as a witness was not accounted for.

O'Malley, as a witness for the defendant, testified that Frank Morris had worked for the defendant for about 11 years, that in August, 1945, Morris was "Territory Manager" for the entire State of Ohio, and that Morris "travelled continuously, covering all of our accounts, people to whom we sold goods in Ohio, he called on them from day to day, and apportioned or allotted merchandise to them based largely on what they had bought before the war," that Morris continued in that capacity until November 1, 1945, when he was made "Sales Promotional Manager," that "we asked all of our territorial representatives to be on the look-out for men who would be interested in becoming a junior salesman when we needed to put on junior salesmen," and that he did remember telling Morris in the telephone conversation not to set any more starting dates, and that he did say to Morris "You haven't any authority to set dates for anybody to start work."

O'Malley further testified that Morris "had no authority outside of that, only to write orders," and that "we did not authorize anybody in our organization to hire salesmen from that time on. We did accept applications." However, in passing on the propriety of the motion in question, the trial court could not, and this court

spring of 1944, and that defendant would not be able to use salesmen until it was necessary to call upon "and to assure every that all plans we made here at the plant for our counter-side operations are necessarily being on long delayed."

Thereafter and on June 26, 1947, the plaintiff commenced this suit.

When called by the plaintiff as an adverse witness, O'Malley testified that Morris "is still employed by our company. I think he is now on his way to court. I didn't see him but talked to him last Sunday." However, Morris did not testify or appear and his absence as a witness was not accounted for.

O'Malley, as a witness for the defendant, testified that Frank Morris had worked for the defendant for about 11 years, that in August, 1945, Morris was "territory manager" for the entire state of Ohio, and that Morris "travelled continuously, covering all of our accounts, people to whom we sell goods in Ohio, to collect on them from day to day, and supervised or allotted merchandise to them based largely on what they had bought before the war." that Morris continued in that capacity until November 1, 1945, when he was made "Sales Promotional Manager," that "we asked all of our territorial representatives to be on the look-out for men who would be interested in becoming a junior salesman when we model to put on junior salesmen," and that he did remember talking Morris in the telephone conversation not to set any more starting dates, and that he did say to Morris "You haven't any authority to set dates for anybody to start work."

O'Malley further testified that Morris "had no authority outside of that, only to write orders," and that "we did not authorize anybody in our organization to hire salesmen from that time on. We did accept applications." However, in passing on the propriety of the motion in question, the trial court could not, and this court

cannot, properly consider such contradictory evidence.

While Evans was testifying the defendant specifically objected to Evans being permitted to testify as to each of his alleged conversations and transactions had with Morris until it was first shown that Morris was an agent of the defendant and as such agent had authority to employ salesmen. On the statement of plaintiff's counsel that the testimony would be later connected up to show such agency, such objections were overruled, and we believe properly so. In view of all the testimony we do not believe there was any error in such rulings. An agency cannot be proved by the mere declarations of an agent. (Proctor v. Tows, 115 Ill. 138, 140.) However, such declarations are admissible as against the principal to show the scope of authority once the agency has been established. (Faber-Musser Co. v. Dee Clay Co., 201 Ill. 240; ~~[illegible]~~ Ill. ~~[illegible]~~.)

In Faber-Musser Co. v. Dee Clay Co., 201 Ill. 240, 244, the court said: "The law is well settled that a principal is bound equally by the authority which he actually gives his agent and by that which by his own acts he appears to give. (Nash v. Slusser, 163 Ill. 409; Doan v. Duncan, 17 Ill. 272.) 'Apparent authority in an agent is such authority as * * * he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct would naturally suppose the agent to possess.' (2 Corpus Juris, 573.) 'A general agent, unless he acts under a special and limited authority, impliedly has power to bind his principal by whatever is usual and proper to effect such a purpose as is the subject of his employment, and in the absence of known

limitations third persons dealing with such a general agent have a right to act on the presumption that the scope and character of the business he is employed to transact measures the extent of his authority and to hold the principal responsible for the agent's acts within such authority.' (2 Corpus Juris, 581; see to the same effect, 21 R.C.L. 854.) 'Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority.' (21 R.C.L.907.)" In 2 C.J.S. p. 1355, it is said: "Authority in an agent to employ may be established either from a direct grant of the requisite power, from a course of conduct by which the principal recognizes and tacitly acquiesces in the existence of such authority, or by bestowing on the agent powers and responsibility of such magnitude, as, for instance, in the general management of a business, as to involve such employment as a necessary incident to the execution of the agency." In 2 C.J.S. p. 1359, it is said: "As a general principle, where it is essential to the proper transaction and carrying on of the business committed to the agent, as where the extent of the agent's duties makes such assistance necessary, the agent has implied authority to appoint a subagent." In Globe & Rutgers Fire Ins. Co. v. Eureka Sawmill Co., 151 So. p. 831, the court said: "And it has been held, as a general principle, that where subagents are necessary to the proper

limitations which overcome dealing with such a general rule have a right to act on the presumption that the agent or officer of the business has in employed to transact matters the extent of his authority and to hold the principal responsible for the exercise of this within such authority." (9 Corpus Juris, 771; see to the same effect, 21 R.C.L. 864.) "Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usage and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and dealing with the agent, the principal is estopped as against such person from denying the agent's authority." (21 R.C.L. 857.) In Corpus Juris, it is said: "Authority in an agent to employ may be established either from a direct grant of the requisite power, from a course of dealings by which the principal recognizes and ratifies transactions in the existence of such authority, or by ascertaining or the agent possessing the responsibility of such capacities. So, for instance, in the general management of a business, we is involve such employments as a necessary incident to the execution of the agency." In 9 C.J., p. 1170, it is said: "As a general proposition, there is a presumption to the proper exercise and authority on of the business committed to the agent, as where the owner of the premise duties under such circumstances necessary, the agent has implied authority to employ a subagent." In Ritche & Ruggers Wire Iron Co. vs. Yorks Iowill Co., 121 So. p. 811, the court said: "And it has been held, as a general principle, that these judgments are necessary to the proper

transaction and carrying on of the business committed to the agent, the latter has implied authority to appoint subagents."

Applying the foregoing rules of law to the evidence most favorable to the plaintiff, it is our opinion that the plaintiff made a prima facie case of his being duly employed by Morris, as a duly authorized agent of the defendant in that behalf.

The defendant contends that even if authority to hire was proven, the trial court was required to allow the motion because no damages were proven. It is true that the complaint does not allege and the evidence does not show the term of employment. However, we consider it sufficient to say that for a breach of the contract the plaintiff would be entitled to at least nominal damages, (Doyle v. School Directors, 36 Ill.App. 653), and that the question of the allowance of any substantial damages is not before us.

For the reasons indicated the judgment of the trial court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

transaction and carrying on of the business committed to his care, the latter has implied authority to execute subrogation."

Applying the foregoing rules of law to the evidence most favorable to the plaintiff, it is our opinion that the plaintiff made a prima facie case of his being duly employed by Arnold, as duly authorized agent of the defendant in that behalf.

The defendant contends that even if authority to hire, was proven, the trial court was required to allow the motion because no damages were proven. It is true that the complaint does not allege and the evidence does not show the terms of employment. However, we consider it sufficient to say that for a breach of the contract the plaintiff would be entitled to at least nominal damages, (Doyle v. School District, 40 Ill.App. 624), and thus the question of the allowance of any substantial damages is not before us.

For the reasons indicated the judgment of the trial court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT,
October Term, A. D. 1948

TERM NO. 48-0-4 AGENDA NO. 5

DENNY V. HASSAKIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Jefferson County, Illinois.
-vs-	)	
HARRIET HASSAKIS, Defendant-Appellant.	)	

BARDENS, J.

Plaintiff-Appellee, Denny V. Hassakis (hereinafter called plaintiff) brought suit for divorce against Defendant-Appellant, Harriet Hassakis (hereinafter called defendant) in the circuit court of Jefferson County, Illinois on March 7, 1947, alleging that she had been guilty of extreme and repeated cruelty towards the plaintiff during the time of their married life. On motion of defendant the complaint was dismissed on the grounds of insufficiency in that plaintiff did not charge any specific acts of cruelty, together with the dates and places on which and at which they were supposed to have occurred. By leave of court an amendment to the complaint was filed by plaintiff by which this objection was overcome. Answer to the complaint and amendment thereto was filed by the defendant, as was also her counter-claim seeking separate maintenance and support. Plaintiff filed his answer to defendant's counter-claim, and reply of defendant thereto was filed. On the issues thus formed the cause was heard before the court, without a jury, on November 12, 1947 and thereafter, to-wit, on January 12, 1948, the court made and ordered to be made effective as of the date of filing, which was on February 2, 1948, a decree in and by which it was found that the defendant "had

been guilty of extreme and repeated cruelty during the time of their married life in that she struck the plaintiff in the early part of 1939, at their home on north 13th street, Mt. Vernon, and at the same time and place attempted to strike the plaintiff with a knife; that the defendant called the plaintiff obscene and vile names; hit him with a shoe, scratched his face, and threatened to take his life; that on or about the time of the separation of the parties the defendant struck the plaintiff and threatened to take his life with a knife." The decree further found that the plaintiff was entitled to the relief sought by his complaint, and ordered and adjudged that the marriage between the plaintiff and defendant was dissolved as in the statute in such cases made and provided.

Defendant brings the matter to this court and, among other errors charged, contends that the court erred in denying defendant's motion for leave to amend her counter-claim to ask for an adjustment of property rights. From the record it appears that the property involved consists of an 87 acre farm, the home property located on north 13th street, Mt. Vernon, on which premises are located both a large and small house, and that title to all of this property is in joint tenancy; that the parties own, as tenants in common, a certain described vacant lot, and that title to a lot and the building thereon, occupied as a tavern, which was acquired by the plaintiff prior to his marriage with the defendant, stands in the name of the plaintiff. We are of the opinion that the trial court did not abuse its discretion in denying defendant's motion for leave to amend her counter-claim, as above, for the reason there is no showing why the defendant did not ask for a property settlement in her original answer or, at least, ask leave to amend in this respect before the date on which the court announced its ruling. Furthermore, it does not appear that at the time of making this motion there was any tender of the amendment proposed to be made. Fortier v. Fortier 320 Ill. App. 626.

Defendant further charges that the court erred in finding the equities with the plaintiff and in granting plaintiff a divorce; that the plaintiff, as a matter of law, failed to prove any ground for divorce as provided by statute; that the finding and decree are against the manifest weight of the evidence, and that it was error to deny, for want of equity, the relief sought by the counter-claim of defendant. In support of her contention that the plaintiff, as a matter of law, failed to prove any ground for divorce as provided by statute defendant cites and relies upon the rule announced in the case of Whitlock -v- Whitlock, 268 Ill., 218. In our opinion the instant case is not unlike the case of Podgornik -vs- Podgornik, reported in volume 392 Ill. at page 124, wherein it is stated: "The acts of adultery and cruelty alleged to have been committed by appellant were testified to by appellee and denied by appellant. There was some rather unconvincing evidence which tended to corroborate each of them. The decree for divorce having been entered by the chancellor upon conflicting testimony as to the facts and findings on which it was based, we would not be justified in reversing that part of the decree which is dependent upon the weight and credence to be given to the testimony of the parties." Inasmuch as the holding in the Podgornik case, supra, so far as relates to the degree of proof required, does not conform to the rule laid down in the earlier case of Whitlock -v- Whitlock, supra, we do not feel bound by the holding in the latter mentioned case. In the case at bar the findings of the chancellor are dependent on the weight and credence to be given to the testimony of the parties and therefore we would not be justified in reversing the decree for divorce.

We find no reversable error and the findings and decree of the trial court are, accordingly, affirmed.

Affirmed.

Culbertson, P. J. and Scheineman, J. Concur.

(Publish in Abstract Form, only)

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

February Term, A.D. 1949

General No. 9622 Agenda No. 8

John Warner, et al., Plaintiffs, vs. Ella King, et al., Defendants.	337 I.A. 39
John Warner, Jr., Appellee, vs. Winifred W. Rogers, Appellant.	Appeal from Circuit Court of DeWitt County

Wheat, J.

This is an appeal from a decree of the Circuit Court of DeWitt County, Illinois, entered April 12, 1948, appointing John Warner, Jr. as a co-trustee of the trust estate created by the will of Clifton H. Moore, deceased. The latter died April 29, 1901, a resident of said county, seized of a large amount of real and personal estate which now comprises the trust estate. The bulk of the estate now consists of farm lands, 14,447.06 acres in Illinois, 5,332.44 acres in Iowa, 12,700 acres in Kansas, 680 acres in Missouri, and 2,640 acres in Nebraska. The trust estate was valued at more than $3,000,000 in 1925 and is now valued at about twice such amount.

At the time of his death, testator left him surviving his widow, a son Arthur Moore, and five grandchildren, being the children of his deceased daughter Winifred Moore Warner, who was the wife of Vespasian Warner. The son, Arthur Moore, died in November, 1901, leaving no children. The daughter, Winifred Moore Warner, had five children: Vesper Warner, now deceased with no descendants; John Warner, who was a trustee and who died December 18, 1945, leaving as his sole descendant John Warner, Jr. (petitioner-appellee herein); Clifton M. Warner, who is living and has no descendants and who is one of the trustees; Frances W. Crist, who is living, has no descendants, and who is one of the trustees; and Winifred W. Rogers, who is living and who is one of the trustees and who has one child, Elizabeth Dowdall Hyatt, the latter having three minor children living: Clifton Moore Warner Hyatt, Elizabeth P. Hyatt, and John Kenneth Hyatt, Jr..

Vespasian Warner, a son-in-law of testator, and Arthur Moore were named as executors of the will and as testamentary trustees of his trust estate. Arthur Moore died in 1901, and Vespasian Warner continued to manage the trust until his death on March 31, 1925. The will provided no method of naming successor trustees. In a Circuit Court proceeding in 1925 a consent decree was entered on April 6, 1925, pursuant to stipulation, which provided for the appointment as co-trustees the four then living children of Winifred Moore Warner and Vespasian Warner, being Clifton M. Warner, John Warner, Winifred W. Rogers, and Frances W. Crist. The decree provided that Clifton M. Warner should be the managing Trustee of the estate, subject to the order and

direction of his co-trustees and the Court. The four co-trustees assumed their duties as such and continued until December 18, 1945, when John Warner, co-trustee, died, thus leaving Clifton M. Warner, Winifred W. Rogers, and Frances W. Crist as the surviving co-trustees.

These three persons and petitioner-appellee, John W. Warner, Jr., are the present life beneficiaries of the trust estate, John Warner, Jr. taking the share of his deceased father, John Warner. Twenty years after the death of the survivor of the said three grandchildren, the real estate is to be sold and the trust estate is to be divided, per stirpes, among the then heirs of the testator. The petitioner, John Warner, Jr., and Elizabeth Dowdall Hyatt are thus contingent remaindermen, as they will share the trust corpus if they are in being at the end of such twenty-year period. Otherwise the entire trust estate, as the family relationship now stands, will go to their respective heirs, per stirpes.

On September 6, 1947, John Warner, Jr., son of the said John Warner, who, in his lifetime was a co-trustee, petitioned for his appointment as a co-trustee, in which petition he set up part of the factual history aforesaid, alleged that he was now 41 years old and a life-long resident of Clinton, DeWitt County, Illinois; that the managing trustee, Clifton M. Warner, has been a resident of such county during his trusteeship, and that the trustees, Frances W. Crist and Winifred W. Rogers, were not, at the time of their appointment, residents of the State of Illinois and have never since been, being residents of California and Rhode Island, respectively. The petition further alleged

that a majority of the trust realty is located in Illinois; that petitioner is familiar with the property in Illinois and other states; that petitioner is in every way qualified to be a trustee and to take the place of his deceased father as such; and that it will be for the best interests of the estate that he be so appointed.

To this petition, Winifred W. Rogers, as a co-trustee and as a beneficiary, filed objections on the ground that no proper showing is made for opening up the 1925 decree; that petitioner is an important officer and stockholder in the John Warner Bank of Clinton, Illinois, and, as such, has the burden of attending to the affairs of said bank which engrosses his attention to such an extent that he will be unable to give adequate attention to the duties of a trustee; that said bank is the depository of the funds of said trust estate and conflicts of interest may arise therefrom, and that there are other good and valid reasons for denying the prayer of the petition. The petitioner filed a reply to these objections, and the guardian ad litem for the minor defendants, Clifton Moore Warner Hyatt, Elizabeth T. Hyatt, and John Kenneth Hyatt, Jr., filed a formal answer to the petition. The co-trustees, Clifton M. Warner and Frances W. Crist, entered no appearance and filed no objections or pleadings of any kind. On these pleadings the cause was heard by the Court. On April 12, 1948, the Court entered an order appointing the petitioner John Warner, Jr. as co-trustee with full power and authority heretofore given to the other co-trustees under the 1925 decree, which order also provided that the trustees should within 45 days file with the Clerk of the Court a written

instrument designating a bank other than the John Warner Bank of Clinton, Illinois, as depository for the funds of said trust estate. This appeal is taken by Winifred W. Rogers from the said order of April 12, 1948.

The evidence in the case consisted of the testimony of the petitioner, John Warner, Jr., and that of the objector, Winifred W. Rogers, together with certain documentary exhibits. John Warner, Jr. testified that he is 41 years old and a life-long resident of Clinton, Illinois; that he attended Culver Military Academy, Amherst College, and Harvard Graduate School of Business Administration; that he served in the Naval Bureau of Ordnance during the war and was discharged a Lieutenant Commander; after the war he returned to the John Warner Bank at Clinton as Assistant Cashier and became Cashier upon the death of his father, December 18, 1945; the bank has five officers including three assistant cashiers; that he was employed in the office of the C. M. Moore trust estate for a year and a half and has a general familiarity with the estate and with the tenants; that he owns 160 acres of land and that he and his mother own jointly about 1000 acres, all in DeWitt County, which he manages; he also owns and manages two business buildings; that he desires to be appointed trustee and will arrange to take time to consult with the managing trustee whenever he wishes, and that it will not interfere with his bank duties; that he would be able to go to any of the farms in Iowa, Illinois, Kansas, Ohio, and Missouri, at any time it would be necessary; that Winifred W. Rogers, co-trustee, lives in Newport, Rhode Island, and Frances W. Crist, co-trustee, lives in Oakland,

California; that none of the trustees except Clifton M. Warner and John Warner, father of petitioner, have lived in Illinois for a number of years; the main office of the managing trustee is in Clinton, Illinois, and the trust funds have been kept in the John Warner Bank since the decree of 1925. Petitioner owns 37% of the stock which had been owned by his father continuously during the period of his trusteeship; the managing trustee, Clifton M. Warner, owns one-half of the stock of the bank and is a bank director; the deposits of the bank run between four and a half to five million dollars; the deposits of the trust estate amount to about 1% of total deposits; no interest is paid on any bank deposit.

It is first urged that no proper showing was made for the appointment of another co-trustee and that the Court had no power to make the appointment of another co-trustee upon the death of trustee John Warner. Courts of equity have broad powers in the supervision of trust estates. Such Courts may, and ordinarily will appoint a trustee where the acting trustee dies in office. The fact that there are surviving trustees available to execute the trust does not deprive the Court of its power to appoint a new trustee to replace the one who had died. (65 C.J. 591) In this case, two of the three remaining trustees are and have been for many years non-residents of the State of Illinois. Contrasted to this, the petitioner, age 41 at the time of the hearing, has been a life-long resident of Illinois, his home is at the center of trust activities, he is familiar with the trust estate, and is experienced in farm management and business affairs generally. The trial court, in a well-considered written

opinion, made these comments: "None of the parties interested in said estate filed any pleading in opposition to the allowance of said petitioner except the current beneficiary, Winifred W. Rogers. The guardian ad litem for the children of Elizabeth Kyatt filed a general answer praying for strict proof. * * * It will be noted that the record is silent as to the respective ages and the present conditions of health of the three surviving co-trustees appointed under the original decree, but it appears from said decree that said John Warner, Jr. was a minor at the time of its entry (1926) and that the surviving co-trustees were adults. * * * In Yates v. Yates, 255 Ill. 66 at 73, the Court said: 'Upon an application being made to an English Chancery Court to appoint a remainderman as trustee, the chancellor said: " I can not appoint a person entitled in remainder, as his interest is somewhat opposed to that of the plaintiff. It would be for his advantage to lay out trust money in making improvements on the property instead of making accumulations for the benefit of the infant."'" In the instant case the trial court then said: "If it would be to the advantage of the remainderman to lay out trust funds in improvements on the property instead of making accumulations, it would likewise follow that it would be to the advantage of the present current beneficiaries to refrain from making repairs of a permanent character, because the expense would reduce the net income to be distributed annually. * * * From the stipulation entered into by the then (1926) current beneficiaries, it appears that they agreed upon a policy whereby each beneficiary should be appointed co-trustee in order to

be in a position to personally participate in the formation of the policy and general management of said trust. In view of the policy adopted by the then current beneficiaries at the time the original decree was rendered, no one of them is now in a position, in equity, to object to the appointment of the petitioner as such co-trustee. The present co-trustees constitute a majority and they are in a position to fully protect the rights of the surviving current beneficiaries as opposed to the interests of the remainderman."

We hold that the court in equity had the power, in its discretion, and for the best interests of the trust estate, to appoint a co-trustee to succeed John Warner, co-trustee, deceased. There remains the objection of Winifred . Rogers that conflicts of interest may arise in the duties of petitioner John Warner, Jr. as co-trustee and as an official of the John Warner Bank of Clinton.

It is first noted that the decree of 1925 recites as follows: "That during the time between the date of the death of the said Vespasian Warner and the appointment of a trustee herein the complainants have been collecting and depositing the rentals of said trust estate as received by way of check or otherwise in the John Warner Bank of Clinton, Illinois, to the credit of said trust estate * * * and that said action of said complainants is hereby approved and confirmed by the Court." It should be kept in mind that the complainants referred to were Clifton W. Warner, who was then and now is a stockholder in such bank, and John Warner, who then was a stockholder of the bank and so continued to be until his death in 1945. This 1925 consent decree

named said John Warner as co-trustee and Clifton M. Warner as managing trustee regardless of their interest in the bank. From 1926 to 1948, the date of death of John Warner, there was no objection made by anyone as to the use of such bank as a depository or to any conflict of interest between Clifton M. Warner and John Warner as co-trustees and as stockholders in the bank. In view of the policy adopted by the interested parties, a possible objection to the continuing acting of Clifton M. Warner because of his bank connection would be without merit, and it follows that such objection to the qualification of the petitioner John Warner, Jr. is likewise without merit. If a majority of the trustees so desire they may at will select another bank as depository. If prejudice is shown, any interested party may obtain relief at any time by application to the Court. We hold that the trial court, under the pleadings and the factual situation, was not justified in including in his decree the following: "that the trustees in this cause, including the petitioner herein, shall file in the office of the Clerk of the Court within forty-five days from the date hereof, a written designation of a bank other than the John Warner Bank of Clinton, Illinois, as the depository for the funds of said trust estate."

It is urged that petitioner has assigned no cross-errors nor filed a cross-appeal and that therefore this portion of the decree cannot be considered. Such is not the law. In Schneiderman v. Interstate Trans. Lines, 401 Ill. 172, the Court stated that it was not necessary to assign cross-error to preserve a point relied upon by appellee.

In our opinion the trial court, in the exercise of its chancery jurisdiction and for the best interests of the trust

estate, properly exercised its power in the appointment of John Warner, Jr. as co-trustee, but went beyond the realm of the issues and contrary to the factual situation in ordering the discontinuing of the bank in question as depository for the trust estate.

The judgment of the Circuit Court is affirmed in part and reversed in part, with directions to modify the decree in accordance with the opinion.

Affirmed in part and reversed
in part, with directions.

Gen. No. 10209 Agenda No. 23

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1947

JAMES PALEFRONE, FLORIAN KOTOWSKI, ARNOLD SLETTA, OSCAR JACOBS and PETER (PETE) PADDILLA, Appellants vs EVERETT J. SHELTON and GLENN GAGE Appellees	APPEAL FROM THE CIRCUIT COURT OF LaSALLE COUNTY

Dove, J.

On the evening of December 7, 1944 the plaintiffs were riding as paid passengers in a bus returning to their homes in Ottawa from the shipyard in Seneca. They were sitting at various places along the left hand side of the bus at the time the bus was involved in a collision with a truck owned by one of the defendants and driven by the other defendant. Upon a trial of the issues, the jury returned a verdict finding both defendants not guilty. A motion for a new trial was overruled and the record discloses that on March 28, 1947 the following

Gen. No. 10909 Agenda No. 23

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1947

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vs	APPEAL FROM THE CIRCUIT COURT OF LaSALLE COUNTY
EVERETT L. SHELTON and GLENN GAGE Appellees	

Dove, J.

On the evening of December 7, 1944 the plaintiffs were riding as paid passengers in a bus returning to their homes in Ottawa from the shipyard in Seneca. They were sitting at various places along the left hand side of the bus at the time the bus was involved in a collision with a truck owned by one of the defendants and driven by the other defendant. Upon a trial of the issues, the jury returned a verdict finding both defendants not guilty. A motion for a new trial was overruled and the record discloses that on March 23, 1947 the following

order was entered, viz:

> "Now on this day come the parties hereto by their respective attorneys and the motion of the plaintiff for a new trial coming on for hearing, and the court now being fully advised in the premises, overrules said motion and a new trial is denied by the court. Thereupon judgment is thereupon rendered herein in favor of defendants against the plaintiff on the verdict of the jury, the jury having found the defendants not guilty."

Thereafter a notice of appeal was filed on June 19, 1947 and on August 9, 1947 the transcript of the record was filed in this court. On September 9, 1947 the abstract of record and appellant's brief and argument were filed. On September 19, 1947 appellee's brief and argument was filed herein and at the October term 1947 the cause was argued orally and taken under advisement.

At the conclusion of the oral argument it was suggested to counsel that no final judgment appeared in the record. Thereafter on December 15, 1947 appellants filed in this court their motion for leave to file a certified copy of an expanded judgment rendered in this cause by the circuit court of LaSalle County on November 28, 1947. Counsel for appellees objected to this and filed herein suggestions in opposition thereto.

It appears that on November 28, 1947 the circuit court of LaSalle County entered the following order in this cause, viz:

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"Now on this day come the parties hereto by their respective attorneys and the motion of the plaintiff for a new trial coming on for hearing, and the court not being fully advised in the premises, overrules said motion and a new trial is denied by the court. Thereupon judgment is thereupon rendered herein in favor of defendants against the plaintiff on the verdict of the jury, the jury having found the defendants not guilty."

Thereafter a notice of appeal was filed on June 19, 1947 and on August 4, 1947 the transcript of the record was filed in this court. On September 2, 1947 the abstract of record and appellant's brief and argument were filed. On September 18, 1947 appellee's brief and argument was filed herein and at the October term 1947 the cause was argued orally and taken under advisement.

At the conclusion of the oral argument it was suggested to counsel that no final judgment appeared in the record. Thereafter on December 15, 1947 appellants filed in this court their motion for leave to file a certified copy of an expunged judgment rendered in this cause by the circuit court of Lasalle County on November 28, 1947. Counsel for appellees objected to this and filed herein suggestions in opposition thereto.

It appears that on November 28, 1947 the clerk of the court of Lasalle County entered the following order in this cause, viz:

"This matter coming on again upon the suggestion of the Judges of the Appellate Court of Illinois for the Second District that in their opinion the recitations in the judgment order, as the same appears in the record and files of this cause in this Court, are incomplete and that the same should be enlarged or expanded, and a certified copy of the enlargement filed with the Clerk of the Appellate Court, it is now considered by this Court that the suggestion of the Judges of the Appellate Court shall be adopted.

IT IS THEREFORE NOW ORDERED that the Clerk of this Court rewrite upon the records of this Court the judgment order, so that the same shall read as follows:

> 'On motion of the defendants, IT IS ORDERED that judgment is now rendered upon the verdict of the jury finding the defendants not guilty, heretofore returned and filed.
>
> "Whereupon it is considered by the Court that the plaintiffs take nothing by their aforesaid action, but that the defendants go hence without day and do have and recover of and from the plaintiffs their legal costs and charges (if any) in this behalf expended and have execution therefor.'

E N T E R:

Dated: November 28, 1947. FRANK H. HAYES
Judge of the Circuit Court
of LaSalle County."

The law is well settled that an appeal is perfected when the notice of appeal is filed in the lower court. (162 East Ohio Street Hotel Corp. v. Lindheimer, 368 Ill. 294; Francke v. Eadie, 373 Ill. 500). As a general proposition the jurisdiction of the circuit court ceased, and

"This matter coming on again upon the suggestion of the Judges of the Appellate Court of Illinois for the Second District that in their opinion the recitations in the judgment order, as the same appears in the record and files of this cause in this Court, are inconsistent and that the same should be enlarged or expunged, and a certified copy of the enlargement filed with the Clerk of the Appellate Court, it is now considered by this Court that the suggestion of the Judges of the Appellate Court shall be adopted.

IT IS THEREFORE NOW ORDERED that the Clerk of this Court certify upon the records of this Court the judgment order, so that the same shall read as follows:

> 'On motion of the defendant, IT IS ORDERED that judgment is now rendered upon the verdict of the jury finding the defendants not guilty, heretofore entered and filed.
>
> 'Whereupon it is considered by the Court that the plaintiffs take nothing by their aforesaid action, but that the defendants go hence without day and do have and recover of and from the plaintiffs their legal costs and charges (if any) in this behalf expended and have execution therefor.'

F H T R E:

Dated: November 28, 1947. FRANK H. HAYES
Judge of the Circuit Court
of Lasalle County."

The law is well settled that an appeal is perfected when the notice of appeal is filed in the lower court. (182 East Ohio Street Hotel Corp. v. Lambertson, 388 Ill. 294; Pennoyer v. Neff, 375 Ill. 500). As a general proposition the jurisdiction of the circuit court ceased, and

the jurisdiction of this court attached when the notice of appeal was filed. This court has jurisdiction to review the questions which arose upon the record as it existed on June 19, 1947 when the notice of appeal was filed in the circuit court. (Wolcott v. Village of Lombard, 387 Ill. 621 ; Simon v. Balasic, 316 Ill. App. 442; Bollaert v. Kankakee Tile and Brick Co., 317 Ill. App. 120; Dunwoody and Co. v. Washington, 315 Ill. App. 54).

The order entered by the circuit court on November 28, 1947 was an ex parte order, entered at the request of and on motion of appellant without notice to counsel for appellees and entered long after the appeal to this court had been perfected and after this cause had been submitted upon the record as it then existed and taken under advisement by this court.

For want of a final judgment, this appeal must be dismissed.

Appeal dismissed.

Under the authorities, the order [illegible] November 28, 1947 is not a final judgment. [illegible] v. [illegible] of Teutopolis, 31 [illegible]; Mid-City [illegible] Mercantile, Inc. v. [illegible], 327 [illegible] App. 26[illegible]; Aetna Plywood & Veneer Co. v. [illegible], 336 Ill. App. 339.

the jurisdiction of this court attached when the notice of appeal was filed. This court has jurisdiction to review the questions which arose upon the record as it existed on June 12, 1947 when the notice of appeal was filed in the circuit court. (Wolcott v. Village of Lombard, 397 Ill. 621; Simon v. Salasic, 316 Ill. App. 442; Dollaert v. Kankakee Tile and Brick Co., 317 Ill. App. 120; Dunscody and Co. v. Washington, 318 Ill. App. 64).

The order entered by the circuit court on November 28, 1947 was an ex parte order, entered at the request of and on motion of appellant without notice to counsel for appellees and entered long after the appeal to this court had been perfected and after this cause had been submitted upon the record as it then existed and taken under advisement by this court.

For want of a final judgment, this appeal must be dismissed.

Appeal dismissed.

44471

WILLIAM A. HOLLAND, Appellee,	
v.	APPEAL FROM SUPERIOR COURT COOK COUNTY
CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Appellant.	

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

William A. Holland filed a two count complaint against the trustees of the corporation doing business as the Chicago Surface Lines. The first count alleged that on March 26, 1945 plaintiff was a passenger on one of the defendants' westbound Lawrence avenue streetcars; that defendants by their employees and servants then and there in charge of the street car, then and there so negligently and improperly ran and operated it that as a direct result and proximate consequence, it was so run, managed and operated that he was thrown with great force and violence and injured; and that he was then and there using due care for his own safety. The second count charged that the defendants then and there negligently, carelessly and improperly ran, managed and operated the street car in that there was an obstruction, unevenness or protrusion of metal or other substance over and above the surface of the platform of the vestibule of the street car, and that in attempting to walk over the floor of the vestibule to proceed into the body of the car plaintiff fell or tripped on the obstruction, unevenness or protrusion of metal or other substance, and that as a direct result and proximate consequence of such negligence, he, who was then and there using due care and caution for his

own safety, was thrown with great force and violence upon and against the floor of the vestibule of the car, resulting in the injuries complained of. Defendant denied the material allegations of the complaint and alleged that the plaintiff, in violation of an ordinance of the City of Chicago making it unlawful for any person to board or alight from a street car or vehicle while it is in motion, was then and there boarding the street car while in motion. Prior to the trial the Chicago Transit Authority, a municipal corporation, was substituted as defendant. The trial resulted in a verdict finding defendant guilty and assessing damages at $2,500. A motion for a new trial was overruled and judgment was entered on the verdict, from which defendant prosecutes this appeal.

Defendant asserts that Count I is not supported by any evidence. The negligence charge in this count is confined to the employees of defendant who were then and there in charge of the operation of the street car, and who were alleged to have then and there negligently run, managed and operated the street car. Plaintiff's evidence as to negligence is confined to the alleged existence of a bolt or screw protruding from the floor of the vestibule. There is nothing in the record to show that the condition causing the injuries was brought about then and there by the negligent running, management and operation of the street car by the employees who were then and there in charge of its operation. Plaintiff makes no contention that defendant was guilty of any negligence other than that specifically alleged in Count II. Sec. 68 of the Civil Practice Act provides that where there is more than one count and an entire

verdict is rendered thereon, the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts be sufficient to sustain the verdict. There was a general verdict and evidence to support the allegations of Count II.

Defendant contends that the judgment is against the manifest weight of the evidence to prove proximate cause and due care of plaintiff, as alleged in Count II. Plaintiff replies that the judgment is amply supported by the manifest weight of the evidence; that both proximate cause and the exercise of due care by plaintiff were proved; that whether there was a violation of the safety ordinance was a question of fact for the jury; that the testimony of defendant's witnesses was so self-contradictory, inconsistent with the established facts, unreliable, conflicting, incoherent and improbable as to be irreconcilable; that the question of the preponderance of the evidence was for the jury; that where the evidence is conflicting, the verdict of the jury will not be disturbed even though it may be against the apparent weight of the evidence; that although the court may entertain a contrary opinion to that of the jury, the verdict will not be disturbed unless clearly unwarranted by the evidence; and that notwithstanding the verdict may rest largely upon the unsupported testimony of the plaintiff, which is denied by the witnesses of the defendant, yet such verdict cannot be said to be against the manifest weight of the evidence where plaintiff's evidence is sustained by the probabilities and the witnesses of the defendant have contradicted each other in many respects.

Plaintiff was 34 years old, 6 feet tall and weighed 185 pounds. He wore rather thick glasses and was employed as a chemist. Prior to his employment he attended Armour Institute, now known as the Illinois Institute of Technology, obtaining a master's degree in 1944. His salary was $90 for a five day week. He lived at 4822 North Kimball Avenue and his place of employment was in the 2600 block on North Crawford Avenue. To get there from his home he usually took a westbound Lawrence avenue street car at the northeast corner of Kimball and Lawrence avenues, traveling Crawford avenue and then transferring to a southbound car. He was familiar with the intersection of Lawrence and Kimball avenues. He lived on the west side of Kimball avenue, about 100 feet north of Lawrence avenue. On the morning of the mishap he left his home at about 7:35 a.m. in order to begin work at 8:30 a.m. It was a clear day. He wore an overcoat and oxford shoes. He stood on the sidewalk on the north side of Lawrence avenue 30 or 40 feet east of Kimball avenue. About half a dozen persons were waiting at that corner for the westbound street car. As the street car came from the east, plaintiff walked out to where it usually stopped. He testified that it stopped a little to the west of where he was standing and that he stepped over to board it; that he heard the conductor say, "Step lively"; that when the car came to a full stop, he stepped on the first step, then on the platform; that he was the first person to board the car; that when he made his first step on the platform and was reaching out to pay his fare, he caught the heel of his left shoe on something that was sticking up from the floor, causing him to stumble, lose his balance, weave from side to

side and fall with his legs under him; that the force of his weight falling on his legs broke the bones in his left ankle with an audible snap; that he fell with his legs under him in a fulcrum position; that as he sat on the platform he observed a bone protruding from the inner part of the ankle; that he did not see the bolt or screw on boarding the car because at the time he was reaching out to pay his fare; that he did not recall seeing any passengers on the rear of the platform on **boarding** the car; that as he fell and sat on the platform, the passengers who had been waiting stepped to the platform and walked around him; that the conductor asked him whether he was hurt, which he answered in the affirmative; that he asked the conductor if he heard the bones snap and pointed out the bolt or screw to the conductor; that on receipt of this information the conductor left him sitting on the floor of the platform to take the names of witnesses and to empty the street car of passengers; that thereafter the conductor assisted him off the car and accompanied him to a store on the corner; that the motorman drove the empty car away; that the conductor remained with plaintiff until the arrival of the police; that the conductor did not "bawl him out," or say to him "why did you jump on the street car"; and that witness did not jump on the street car, make two jumps or brush aside or against a woman as he boarded the car.

Four witnesses testified for the defendant, namely, the conductor, two women who boarded the car after plaintiff, and a young man who was a high schoool student at the time of the mishap and in junior college at the time of the trial, who testified that he was standing on the rear platform as

the car approached the place where plaintiff boarded it. The motorman did not testify. The conductor testified that the motorman was sick at the time of the trial; that he had been off for a "few months"; that "they tell me he is seriously sick now"; and that "he had a broken ankle or something, but I haven't seen him for over two months." All of defendant's witnesses testified that plaintiff jumped on the street car while it was in motion and before it stopped and that he fell on the platform. We agree with defendant that the testimony of these witnesses is supported by the probabilities which arise from the manner and force of the fall. The theory relied on by plaintiff was that he boarded the car while it was standing still; that when he reached the platform he could reach the rail around the conductor with his hand; that he extended his hand to pay the conductor his fare and took one step on the platform; and that when he did this he caught the heel of his left shoe on a bolt or screw which protruded a half inch more or less and about a foot or 14 inches from the edge of the platform, which caused him to stumble, lose balance and fall in a sitting position in front of the conductor with his legs under him, with such force as to break the bones in his left ankle with an audible snap.

The conductor and the student denied that there was any screw or bolt protruding from the platform of the car. The conductor also denied that plaintiff said anything to him about a bolt extending from the floor of the car. Plaintiff is not supported by the testimony of any witness. If the car was standing still when he boarded it, as he testified, his loss of balance and weaving from side to side was not due to any motion or movement or stopping of the car. It is true, as pointed out by plaintiff, that the versions of the occur-

rence, as recounted by defendant's witnesses, varied. As stated by Starkie on Evidence, Tenth American Edition, page 830, partial variances in the testimony of different witnesses, on minute and collateral points, are of little importance unless they be of too prominent and striking a nature to be ascribed to mere inadvertence, inattention or defect of memory; and that it so rarely happens that witnesses of the same transaction perfectly and entirely agree in all points connected with it, that an entire and complete coincidence in every particular, so far from strengthening their credit, not infrequently engenders a suspicion of practice and concert. The important point on the issue of due care and proximate cause was whether plaintiff boarded the street car while it was standing still or in motion, and as to this all of defendant's witnesses testified that he boarded the car while it was in motion and fell on the platform.

It is true, as stated by plaintiff, that whether there was a violation of a safety ordinance was a question of fact to be determined by the jury. "The mere fact that plaintiff was violating the law at the time he was injured will not bar his right to recover unless the unlawful act in some way approximately contributed to the accident in which he was injured." Lerette v. Director General of Railroads, 306 Ill. 348; Russell v. Richardson et al., 302 Ill. App. 589. It is well to recall what our Supreme Court said about the duty of the Appellate Court in determining whether a verdict is against the manifest weight of the evidence in Chicago City Railway Co. v. Mead, 206 Ill. 174, 181:

"Section 61 of the Practice Act provides that exceptions taken to the decision of the court overruling a motion for a new trial shall be allowed, and the party excepting may assign for error any decision so excepted to. The duty of considering and deciding upon any error so assigned is entrusted to the Appellate Court. Those courts are a part of the judicial system of the State equally with the jury and the trial judge, and must discharge their duty, not according to the judgment of others, but according to their own judgment. The law commits to the sound judgment of the Appellate Court the question whether the trial court erred in overruling a motion for a new trial on the ground that the verdict is against the weight of the evidence. At the common law the trial of an issue of fact was by judge and jury, the judge stating to the jury the issues and what evidence had been given in support of them, and summing up the whole case. Section 51 of the Practice Act provides that the court shall only instruct as to the law of the case; but trial by jury does not imply a trial without a judge having a supervisory power over the verdict, or without a court of review guided and controlled by its own conscience and judgment in passing upon questions committed to it by the law. If a verdict and judgment are clearly against the weight of the evidence, a new trial should be awarded by the Appellate Court and the issues submitted to another jury."

See also Voigt v. The Anglo-American Provision Co., 202 Ill. 462; and White v. The City of Belleville, 364 Ill. 577. From a careful reading of the transcript of the evidence, we are convinced that it is our duty to reverse the judgment and remand the cause for further proceedings on the ground that the judgment is against the manifest weight of the evidence on the issues of proximate cause and due care.

Defendant also urges that the court erred in giving instruction No. 14, which told the jury that a common carrier of passengers "is responsible for the slightest neglect resulting in injury to the passenger." In Live Stock National Bank of Chicago, Admr. of Estate of Ignazio Migliorisi v. Richardson, et al., 304 Ill. App. 591, reported in abstract form, we said: "We are of the opinion that the part of the instruction which told the jury that the carrier is responsible for the slightest neglect was calculated to minimize the non-insurer rule and to encourage the jury to extend the highest degree of care rule to the prejudice of defendants."

Plaintiff asserts that there was no error in giving this instruction, citing Galena & Chicago A. R. R. Co. v. Fay, 16 Ill. 558; Chicago & Alton R. R. Co. v. Byrum, 153 Ill. 131; Chicago City Railway Co. v. Shaw, 220 Ill. 532; Chicago City Railway Co. v. Shreve, 226 Ill. 530; Van Hoorbecke v. Iowa Ill. Gas & Elec. Co., 324 Ill. App. 88; and Maciejewski v. Richardson, 307 Ill. App. 669, (Abst.) In Lichtenstein v. Fish Furniture Co., 272 Ill. 191, the court said that an opinion that an instruction is proper or that a statute is constitutional, is authority on such instruction or statute only as to the objections raised in such cases, and is not authority for such instruction or statute when another and different objection is raised. In the Byrum case no objection was raised concerning the use of the language "is responsible for the slightest neglect." In Elmore v. Cummings, 321 Ill. App. 234, the court analyzed the Byrum case and pointed out that it did not approve the use of the objectionable words. While the Supreme Court has not had occasion in later cases to discuss the use in this instruction of the objectionable words, that court has passed upon the use of similar minimizing words in instructions on the preponderance of the evidence and has held that such instructions should not be given. See Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207; Teter v. Spooner, 305 Ill. 198; Molloy v. Chicago Rapid Transit Co., 335 Ill. 164; and Wolczek v. Public Service Co., 342 Ill. 482. The objectionable words could only tend to confuse the jury and on a retrial should not be incorporated in the instructions.

Defendant also complains of the giving of instruction No. 5, which told the jury that if they believed from

the evidence that plaintiff became a passenger of the defendant and that defendant did not exercise the highest degree of care reasonably consistent with the practical operation and the character and mode of convenience adopted for the safety of the plaintiff, and the latter was injured because of such failure, "and if you further believe that plaintiff was in the exercise of reasonable care for his own safety at the time of the injury, then you should find the defendants guilty." As this instruction directs a verdict, it must contain a correct statement of all the elements necessary to sustain such verdict. At the time of the injury plaintiff was on the platform of the street car where he fell with his feet under him. If he was in the exercise of reasonable care for his own safety at that time a verdict was directed against defendant without reference to care or lack of care exercised by him before then in getting on the platform. It is defendant's theory that he jumped on the platform while the car was in motion, that in so doing he violated the ordinance and that he thereby was guilty of negligence which was the proximate cause of his injuries. It is obvious that under the issues and the factual situation the giving of this instruction was improper in that it confined the jury in determining whether he exercised due care to the time of the injury.

Defendant states that the court erred in giving instruction No. 8 on the subject of damages without prefacing it with a statement in substance that if the jury finds the defendant guilty they will be required to determine the amount of plaintiff's damages. In view of all the instructions given

we do not believe that the giving of instruction No. 8 would be error. However, on a retrial it would be advisable to preface the instruction in the manner indicated. While it would be proper to give defendant's refused instruction No. 22, we are of the opinion that the failure to give it would not constitute error.

For these reasons the judgment of the Superior Court of Cook County is reversed and the cause remanded for further proceedings not inconsistent with the views expressed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

44565

MARGARET WILLIAMS, Appellee,	
v.	APPEAL FROM SUPERIOR COURT COOK COUNTY
VICTOR A. PIONTKOWSKI and CHARLES M. FOX, Defendants.	
On Appeal of VICTOR A. PIONTKOWSKI, Appellant.	

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Margaret Williams brought a malpractice action against Dr. Victor Piontkowski and Dr. Charles M. Fox. A trial resulted in separate verdicts finding defendants guilty and fixing plaintiff's damages against Dr. Piontkowski at $2,000, and against Dr. Fox in the sum of "blank dollars." Motions by each defendant for a directed verdict for judgment notwithstanding the verdict, and for a new trial were overruled, and judgments were entered on the verdicts. Dr. Piontkowski appeals. For convenience, we will refer to Dr. Piontkowski as the defendant.

He is licensed to practiced obstetrics and as a chiropractor. He describes himself as a drugless physician and treats patients without medicine or surgery. He is not permitted to prescribe medicines or to use instruments. His license to practice in Illinois was issued in 1926. In 20 years he handled around 1,500 obstetrical cases. Plaintiff, a young married woman being pregnant, placed herself under defendant's care on August 13, 1943 for prenatal care, delivery and postnatal care. From then until February

9, 1944 he examined her 13 times, finding her normal in all respects. When her "waters" ruptured on the afternoon of February 22, 1944 he directed by telephone that she go to the Walther Memorial Hospital. She was there received and examined by the hospital's house physician in obstetrics. Between 7:00 P.M. and 2:00 A.M. he examined her five times. Her condition remained normal and progress slow. Nurses were "in and out all the time." Between these hours defendant did not appear at the hospital, but kept in touch with the hospital by telephone. He was 20 minutes distant from the hospital by automobile.

There was a conflict in the testimony. Plaintiff and her husband stated that defendant did not at any time make a pelvimetric or other instrumental examination of plaintiff. He testified that he did. There was testimony that as the time for delivery approached, she communicated with defendant, and that from the time of her admission to the hospital at 4:30 P.M. on February 22, 1944 until 3:30 A.M. the following morning defendant left her completely without the benefit of his presence or professional advice. At 2:30 A.M. on February 23, 1944 the fetus was, according to evidence plaintiff introduced, alive, but by the time defendant arrived at the hospital it was inviable. Defendant's excuse for his absence was that he was not in a position to have gone to the hospital because of office and house calls. The house physician last examined her at 2:00 A.M. on February 23, 1944. At that time he found plaintiff's condition good and the fetal heart sounds properly audible. An hour later he said the fetal heart sounds

suddenly ceased. Defendant was notified and arrived at the hospital in a few minutes. Defendant testified that his examination at the hospital revealed that the child had expired; that plaintiff was not yet ready to deliver; that the head was not on the perineum; and that the head was not engaged.

Dr. Charles M. Fox, who was called in by defendant, testified that he delivered the stillborn child, using therein forceps and scissors and that after delivery he sewed the cut. Plaintiff testified that some time after the delivery she experienced pains, lost control of her bowels and had to wear a diaper; that defendant, giving after-care, heard her complaints, examined her on three occasions and did not prescribe anything. Defendant admits examining her, but denied that she suffered or complained to him. He states that his examination revealed a slow healing of the incision made by Dr. Fox, and that he discovered an area about the size of the head of a straight pin which had not yet properly healed over, but that she was otherwise all right. Plaintiff states that his only advice to her was the drinking of fruit juices. Plaintiff consulted Dr. Fred A. Paradise, a physician, who examined her. She had no control over her bowels and had to wear a diaper all of the time. On examining her rectum, vagina and perineum he discovered that the rectum was torn into, that it was wide open, and that the sphincter muscle "was gone, cut, torn." He said that the sphincter is the muscle that controls the bowel movement, and that it was not there in plaintiff's "functioning because it was torn in two, could not contract." He stated that that muscle makes a

figure 8 around the vagina; that the center portion of the 8 was gone so that the vagina and rectum were one opening; that the partition between the vagina and rectum was gone; and that there was no sign of any sutures there. Dr. Paradise operated on plaintiff in a hospital in May, 1944. She remained in the hospital a week or 10 days and was thereafter laid up at home for a month or two. In the hospital the sphincter was repaired. He did not see her again until just before the trial, when he found that she was pregnant. In his opinion she was 18 years of age.

Dr. Paradise was also examined as an expert witness. He testified that it is customary to take pelvic measurements of a pregnant woman in order to determine whether her pelvis is passable for a normal fetus of 7 or 7-1/2 pounds; that when the head of a fetus is on the perineum "you should go ahead and deliver"; that it is proper practice to permit the fetus to remain in the perineum before delivery "for a few minutes, 15 or 20 minutes;" and that it is not proper to permit the fetus to remain in the perineum for 4 hours. In answer to a hypothetical question he said that in his opinion it was a "neglected delivery." He was also of the opinion that on the hypothesis submitted the cause of the torn condition of the vaginal and sphincter muscle might or could have been caused by "disproportion in size of the baby to the pelvis." He also testified that in his opinion the prenatal care received by plaintiff was not proper. This opinion was based on the fact that the woman was not measured and that the baby was on the perineum for longer than 10 or 15 minutes. He was also of the opinion that the postnatal care received by plaintiff was not proper.

His reasons for that opinion were that there was no repair "made of that perineum." He stated that there might or could be a causal connection between the delivery and the postnatal treatment and the "present condition of ill being" of the patient.

Defendant makes several points which he does not argue. In his argument he states that the sudden death of the fetus in utero was in no way chargeable to him; that it was another one of numerous stillbirths occurring annually in this country; that as to the delivery and the events following, he was in nowise responsible; that the sudden death of the fetus demanded an episiotomy; that having no license to do surgery, he secured the immediate presence of Dr. Fox; that Dr. Fox is professionally well educated, qualifoed and experienced in gynecology; that with the entry of Dr. Fox into the case, defendant lost his right to exercise his own judgment; that thereupon Dr. Fox became solely responsible; that defendant later reentered the case to give after-care; that in so doing he acted as agent for Dr. Fox; that if in the course of the after-care defendant "went wrong", which he does not admit, he, defendant is answerable to his principal, Dr. Fox, and to no one else; that it was not defendant's duty to give plaintiff after-care for something other than her operated perineum; that Dr. Paradise is not a follower of the school of healing practiced by defendant; that the answer he gave to the hypothetical question could not apply to defendant because it was based on "a reasonable degree of medical and surgical certainty"; that this standard was not applicable to defend-

ant; and that when a drugless physician encounters various symptoms he treats the patient "exclusively with manual thrusts and palpations."

Plaintiff testified that defendant did not tell her that he was not licensed to practice medicine. A fair inference from the testimony is that she believed that he was so licensed. In Matthei v. Wooley, 69 Ill. App. 654, the court held that if by treating, operating on, or prescribing for physical ailments a person holds himself out as a doctor to other persons employing him, and they believe him to be a doctor, he will be chargeable as such. See also McNevins v. Lowe, 40 Ill. 209. We are of the opinion that the defendant should be held, as a matter of law, to bear the same responsibility as would a regularly licensed medical practitioner, by reason of the manner in which, through his acts of commission and omission, he misled the plaintiff into believing he was properly qualified to treat the post-parturitional conditions which arose.

The liability of defendant for negligence in the diagnosis and the treatment which he undertook is not affected by the temporary entrance into the case of Dr. Fox for a special purpose and for a limited time. Plaintiff placed herself under the care of defendant and had never, until going to the hospital long after her delivery, either sought or consented to the ministrations of any medical service or giving of any advice other than from the defendant. The services of Dr. Fox were necessary in the immediate emergenct presented by the requirement of surgical delivery. However, Dr. Fox's status was that of an

emergency attendant. Plaintiff testified that she never consulted Dr. Fox professionally. This statement is verified by Dr. Fox. Whatever the relationship may have been between defendant and Dr. Fox, the rights of plaintiff against defendant cannot be prejudiced thereby. Defendant owed a primary duty to plaintiff at all stages of her treatment. The court properly admitted the testimony of plaintiff's expert witness on the issue of whether defendant exercised the care and skill required of him. Defendant contends that Dr. Paradise was not a competent witness because of the fact that he is a medical doctor and the defendant a chiropractor and midwife. At no time did defendant give or purport to give any treatment to plaintiff in his capacity as a chiropractor. Throughout his entire treatment of the plaintiff he was acting as a midwife. While a physician's license is broader than that of a midwife and there are some things connected with obstetrics allowable to a physician and forbidden to a midwife, it does not follow that a physician is not acquainted with what a midwife actually does or should do. The test of the competency of an expert witness is whether he discloses sufficient knowledge of his subject to entitle his opinion to go to the jury. In our opinion the expert testimony of Dr. Paradise was properly admitted.

The case presented factual issues which the jury resolved. We do not find and reversible errors. The court properly entered judgment against defendant. Therefore, the judgment of the Superior Court of Cook County against Dr. Victor A. Piontkowski is affirmed.

JUDGMENT AFFIRMED.

KILEY, J., and LEWE, J., CONCUR.

44620

DANIEL DRAKULICH, Appellant, v. STEPHEN E. HURLEY, JOHN W. CLARKE and ALBERT W. WILLIAMS, Civil Service Commissioners of the City of Chicago, Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE KILEY delivered the opinion of the court.

This is a certiorari proceeding to review the record, of the Chicago Civil Service Commission, upon which plaintiff was discharged from the Police Department. The writ was quashed and plaintiff has appealed.

Plaintiff became a civil service policeman in 1936. He had a good record, was cited and rewarded on one occasion, was commended in an out of town visitor's letter to the Department upon another and as a motor cycle policeman was an efficient, good policeman. In July 1947 charges of neglect of duty and conduct unbecoming a police officer were filed with the commission against him. He was tried and found guilty of neglect of duty in failing to arrest, and of unbecoming conduct in soliciting a bribe of $5.00, from a speeder. Pursuant to the decision he was discharged October 20, 1947.

It is not disputed that this proceeding is governed by Section 12 of the Civil Service Act (Chap. 24 1/2, Par. 51 Ill. Rev. Stats. 1947); that the commission had power to make its finding and decision as to plaintiff only "for

cause, upon written charges and after an opportunity to be heard in his own defense"; and that the charges against plaintiff were written and he appeared with counsel and made a defense. Plaintiff contends the order quashing the writ should be reversed because the findings and decision were not based on clear and convincing evidence in accordance with the holding in Drezner v. Commission, 398 Ill. 219; and because legally applicable proceedings were not observed.

The Drezner case did not involve common law certiorari. It was governed by the Administrative Review Act (Chap. 110, Par. 264, et seq. Ill. Rev. Stats.1947); which empowers the courts on review to hear and determine "all questions of law and of fact presented by the entire record before the court." Par. 274. That Act applies to reviews of records from any agency where the act creating the agency expressly provides. Par. 265. The statement in that case that a crime charged in a civil proceeding must be proved by clear and convincing evidence does not apply in common law certiorari proceedings.

Since written charges and plaintiff's defense is admitted, the only jurisdictional fact in question is that of "cause." Hopkins v. Ames, 344 Ill. 527; People, ex rel Fosse v. Allman, 329 Ill. App. 296; Murphy v. Houston, 250 Ill. App. 385.

Plaintiff does not contend that the charges made against him, if properly shown, would not constitute cause. The vital question then is how far the trial, or this, court can go to determine whether the record shows the jurisdictional

fact of "cause." We think the record need only show that there is evidence tending to prove the charges. Funkhouser v. Coffin, 301 Ill. 257; Hopkins v. Ames; People v. City of Chicago, 234 Ill. 416; City of Chicago v. People, ex rel Gray, 210 Ill. 84; People, ex rel Fosse v. Allman 329 Ill. App. 296; Campbell v. Civil Service, 290 Ill. App. 105; Murphy v. Houston.

Plaintiff's written statement, shortly after his arrest on June 29, 1947, recites that he stopped Frank Hadzima who was driving 40 miles per hour; that he let Hadzima go; that Hadzima asked whether he could "see" plaintiff; and that plaintiff said "if he wants to do so we made the date at 21st Pl.and Ashland for 10:00 the next day." Hadzima testified he was going about 35 miles per hour in a 25 mile limit zone; that he was stopped by plaintiff who asked him for $5.00 in exchange for freedom from arrest and punishment; that he promised to give plaintiff the money the following day; and that he met plaintiff the next day. A police inspector and a lieutenant testified that by arrangement they observed the meeting between Hadzima and plaintiff the day following the speeding violation; that they arrested plaintiff while he stood beside Hadzima's car with head and hand inside; and that Hadzima had his wallet in his hand at the time.

We have noted plaintiff's contentions with respect to inadmissible and incompetent testimony. The material competent evidence recited above clearly tends to support the findings. We need consider no other point raised.

The order is affirmed.

ORDER AFFIRMED.

BURKE, P. J., and LEVE, J., CONCUR.

44517

MARION McADOW, Appellant, vs. PAUL GEORGE PAPSDORF, WALTER SCANLAN, CHARLES V. McCORMACK, and INEZ PAPSDORF, Appellees.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for the alleged negligence of defendants in extracting a tooth and in the postoperative treatment. Prior to the trial defendants Drs. Papsdorf and McCormack died and the respective administrators were substituted as parties defendant. During the trial defendants Dr. Scanlan and Inez Papsdorf were dismissed. The case was tried on the third count of the complaint which alleged in substance that defendant Papsdorf, who specialized in dental surgery, and defendant McCormack, a dentist, failed to use due care and skill as professional persons in extracting plaintiff's tooth; that they fractured plaintiff's jaw, and that their failure to use due care and skill in treating the condition created by them caused an infection or osteomyelitis of plaintiff's jaw bone. Judgments were entered on the verdict of a jury against the administrators of the estates of Doctors Papsdorf and McCormack in the sums of $35,000 and $15,000, respectively. Defendants' motion for judgment notwithstanding the verdict was allowed. Plaintiff appeals.

Plaintiff, forty-five years of age, was employed as a school teacher. On October 2, 1943, accompanied by

her sister, she went to the office of her dentist, Dr. Scanlan, for the purpose of having a lower left molar treated. Dr. Scanlan testified that at that time he took an X-ray of the tooth and palpated the jaw bone (mandible) to determine the muscular structure and diameter of plaintiff's jaw to ascertain whether there were any soft spaces or spots; that he found the tooth devitalized; that the roots were fairly straight and had no decided hook in them; that he observed nothing abnormal in the mouth or jaw of plaintiff; that he found no degeneration of the bone process of the jaw; that he advised plaintiff to have the dead molar extracted. After anaesthetizing the area surrounding the tooth and applying an iodine solution to render those parts sterile he tried to dislodge the tooth by the use of instruments but was unable to do so. He then took another X-ray to see if there was any change in the position of the tooth in relation to the jaw but found none. Thereupon he suggested to plaintiff that it be removed by a specialist and on the same day communicated with Dr. Papsdorf. The first knowledge that he had of the fracture of plaintiff's mandible was contained in a letter which he received from Dr. Papsdorf shortly after October 21, 1943 which stated that plaintiff "has a pathological fracture; that it is almost decayed through. Now do not worry, I have the film which you sent with her which does not even reveal the slightest evidence of bone involvement. Luckily I took X-rays as I went along and these X-rays showed no bone involvement. How she developed such a rapid bone condition is beyond me. * * *

X-rays today reveal the presence of a serious pathological bone condition * * *."

Kenneth William Penhale, a specialist in oral and plastic surgery, testified that he first met plaintiff on November 20, 1943 at St. Bernard's Hospital where he came at the request of Dr. McCormack; that plaintiff had difficulty in swallowing and complained of severe pain which increased as time went on; that she was unable to eat; that she had a splint in her mouth designed to hold the pieces or broken parts of her jaw in their relative position; that X-rays taken October 29, 1943 showed no pathology in the mandible that would cause a fracture; that an X-ray taken April 14, 1944 shows a separation of the two fragments; that there was no callus or bond formation present; that about April 10, 1944 plaintiff entered the Hospital again and the witness used a fixation procedure and an appliance on the fractured jaw known as the Roger-Anderson appliance, which stabilized the jaw, so as to permit development of bony union of the fractured parts; that on August 15, 1944 the witness referred plaintiff to Dr. Phemister at the Billings Hospital; and that during the time the witness treated plaintiff she was in pain and "under sedatives most of the time. She could not open her mouth at all or so little she could only take in liquids and soft diet occasionally."

Dr. McCradie, called in behalf of plaintiff, testified that he saw her October 23 or 24, 1943 at her place of residence; that her temperature was 102; that the

left side of her face was swollen and deformed; that she was in extreme pain and had a marked tenderness over the entire surface of her left cheek; that there was a wound in the gum on the left side of her lower jaw and no drain in the region of the wound; that on October 25, 1943 plaintiff was admitted to St. Bernard's Hospital at which time Dr. McCormack was also present; that X-rays taken at that time disclosed a compound fracture of the left side of the mandible at the junction of the ramus; that X-rays taken subsequently disclosed that the fragments of the broken mandible were not in apposition. Dr. McCradie further testified that on November 20, 1943, at St. Bernard's Hospital, he and Dr. McCormack had a consultation with Dr. Penhale; that Dr. McCormack stated to the witness that he believed he could not properly set the fracture by the system that "we pursued in the past by wiring the teeth together" because there were no teeth on that part of the fracture; and that in the middle of November 1943 there was "a beginning osteomyelitis" in the left side of the mandible of plaintiff "of a new duration not over several weeks old."

Helen McAdow, called in behalf of plaintiff, testified that on October 16, 1943 Dr. Papsdorf, in the presence of Dr. McCormack and plaintiff, told the witness that "the X-rays showed that my sister's jaw had been broken and they would have to wire it"; that on October 22 plaintiff's jaw was wired and immediately thereafter plaintiff and her sister were transported to their home by

Dr. Papsdorf who stated to them that "You girls must promise me that no one will touch this jaw or do anything to it until I return to town * * * I am turning you over to my assistant Dr. McCormack; he will be in charge of you for the next week." The witness further testified that Dr. Papsdorf placed a pair of "snips" in her hands and gave her detailed instructions to cut the wires on plaintiff's teeth in case "there was any gagging or signs of gagging," and that she never saw Dr. Papsdorf after October 22nd; that on October 23 she cut the wires that had been inserted in plaintiff's teeth for the purpose of holding her jaws in position; that she saw Dr. McCormack rewire plaintiff's jaw on several occasions during the period when plaintiff was at the hospital and that defendant McCormack each time brought three or four instruments in his pocket, took them out and proceeded to use them without sterilizing them.

Malcolm P. Brooks, called in behalf of plaintiff, testified in substance that he was graduated from Northwestern University Dental School in 1922 and has practiced in the City of Chicago since that date; that he is engaged in the general practice of dentistry and that in 1931 he had charge of the extraction unit of the Chicago Dental Society for a period of five months during which he extracted from fifty to a hundred teeth a day, five days a week. In response to a hypothetical question propounded by plaintiff's counsel, the witness stated that fracture of the mandible is immediately recognizable from examination

of X-ray films, and that the use of instruments without sterilization after being carried loose in a pocket may induce bacteria.

The question of law presented upon defendants' motion non obstante veredicto is whether, when all the evidence is considered, together with all reasonable inferences from it, in its aspects most favorable to the plaintiff there is a total failure to prove any necessary element of her case. (Weinstein v. Metropolitan Life Insurance Co., 389 Ill. 571.)

In the instant case the evidence construed most favorably to plaintiff tends to show that her jaw was fractured during the process of extraction by Drs. Papsdorf and McCormack; that at the time of extraction there was no pathology in the mandible; that the fracture was traumatic in origin; that the osteomyelitis in the left side of the mandible of plaintiff developed after the fracture of plaintiff's jaw; that fourteen days had elapsed after the extraction of plaintiff's tooth before she was informed by Dr. Papsdorf that the X-ray showed a fracture of plaintiff's jaw bone; that no attempt was made to immobilize plaintiff's jaw for a period of twenty days after it had been broken; that Dr. Papsdorf exacted a promise from plaintiff which in effect bound her to postpone consultation with or treatment by other physicians and surgeons except Dr. McCormack while Dr. Papsdorf was out of the city; that Dr. McCormack on several occasions used unsterilized instruments in rewiring plaintiff's teeth;

that he was present when Dr. Papsdorf first told plaintiff that her jaw was broken; and that Dr. McCormack was in sole charge of plaintiff while Dr. Papsdorf was absent from the city.

From a careful examination of the record we think the evidence tends to show that Drs. Papsdorf and McCormack did not use the skill and care in extracting plaintiff's tooth, and in the treatment of plaintiff after the extraction, ordinarily used by persons in their profession in similar circumstances. See Shutan v. Bloomenthal, 371 Ill. 244, where the material facts are substantially the same as those in the case at bar.

The record shows that defendants filed an alternative motion for a new trial but it does not appear that the trial court ruled upon this motion, as provided in Rule 22 of our Supreme Court Rules. The purpose of Rule 22 is to enable the Appellate Court, in cases where an alternative motion for a new trial has been made, to pass upon both questions so as to avoid circuity of action and more speedily to determine the rights of the litigants. (Millikin Nat. Bank v. Grain Co., 389 Ill. 196; Todd v. S. S. Kresge Co.,384 Ill. 524; Goodrich v. Sprague, 385 Ill. 200.)

For the reasons given, the judgment for the defendant notwithstanding the verdict is reversed, and the cause is remanded with directions to rule upon defendants' motion for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P.J., and KILEY, J., CONCUR.

44552

JOHN E. SULLIVAN, Receiver of Garfield State Bank and R. L. Feltinton, Appellees,	)	
v.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO
MARY O'BOYLE, Appellant.	)	

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

August 18, 1947 plaintiff, as assignee, brought suit to revive a judgment entered by confession on February 17, 1932 for $539.01. Defendant filed a defense and jury demand. On plaintiffs' motion defendants second amended statement of defense and third counterclaim was stricken and judgment entered by the court without a jury, for the sum of $424.01.

The statement of claim alleges that the defendant executed a "promissory judgment note" dated June 1, 1931, for $450 with interest at 7 per cent payable September 1, 1931 to the order of Garfield State Bank, and that defendant deposited with payee "a $500 Kenton Villa Apartment first mortgage bond due 6/1/36"; that judgment was entered on the note February 17, 1932; that an execution was issued and returned "nulla bona"; and that plaintiff acquired title to the judgment by assignment from the receiver of the Garfield State Bank.

Defendant's amended answer and counterclaim, which is entitled "amended counterclaim in the nature of a verified petition or motion for a writ of error coram nobis," alleges in substance that on June 1, 1931 defendant was the owner of a $500 Kenton Villa Apartments first mortgage bond; that at

the time of the purchase of the bond from the Garfield State Bank she was orally assured that the Bank would repurchase the bond at cost less one per cent of the principal and accrued interest; that defendant made a loan at the Bank and deposited the $500 bond as collateral; and that the Bank failed to carry out its agreement to repurchase the bond and apply the proceeds of the sale of the bond to the payment of her note.

The law is well settled that the agreement between the Bank and the defendant to repurchase her first mortgage bond is prohibited by law and unenforcible against the Bank. Hoffman v. Sears Community Bank, 356 Ill. 598: Knass v. Madison and Kedzie State Bank, 354 Ill. 554.) Under the foregoing authorities the court properly struck defendant's amended answer and counterclaim.

Defendant contends that the trial court was without jurisdiction to try the factual issues without a jury. We think this contention is without merit.

The record shows that on March 30, 1948 plaintiff moved to strike defendant's amended defense and counterclaim. This motion was continued by order of court to April 6, 1948. On April 6, 1948 an order was entered sustaining plaintiff's motion to strike. This order also recites: "Now comes plaintiff in this cause, the defendant being absent and not represented, and thereupon the cause comes on for hearing before the court in the regular course for trial without a jury; the court finds the issues against the defendant on scire facias * * *."

Upon the striking of defendant's amended statement of defense and counterclaim there was no issue for the jury

to try. Rule 68 of the Municipal Court of Chicago, which pertains to the assessment of damages by that court, provides: "* * * If, however, the defendant or all or either of the defendants if more than one, shall file a demand in writing for a trial by jury and pay the fee therefor, such defendant or defendants shall be entitled to have the damages assessed by a jury, if they appear at the time of such default and insist thereon." Since defendant failed to appear on April 6, 1948 when her amended defense and counterclaim was stricken, the court was authorized in her absence to assess the damages without a jury.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., AND KILEY, J., concur.

44587

GALE KNITTLE, FLORENCE KNITTLE and DOLORES KNITTLE, Appellees,	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	)	
WILLIAM HEYDEN, Appellant.	)	

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff, his wife, and daughter, as a result of a collision, at the intersection of two highways, between an automobile driven by plaintiff Gale Knittle and a police squad car driven by defendant, a police officer in the Village of Barrington, Illinois. There was a jury trial and verdict and judgment in favor of the plaintiffs Gale Knittle, Florence Knittle, and Dolores Knittle, in the sums of $10,000, $1,500, and $500, respectively. Defendant's motions for a new trial and for judgment notwithstanding the verdict were overruled. Defendant appeals.

The complaint consists of two counts. The first alleges negligence and the second, willful and wanton conduct. Defendant denied the allegations. He filed an additional answer which averred in substance that at the time of the accident he was employed as a police officer for the Village of Barrington a municipal corporation and was at the time and place in "fresh pursuit of a person suspected of having perpetrated a crime," and that in pursuit of such person he was an officer of the Village of Barrington and was performing a duty imposed upon it by the State of Illinois in

the exercise of a strictly governmental function. On plaintiffs' motion defendant's additional answer was stricken.

Early in the morning of July 14, 1946 the plaintiff accompanied by his wife and daughter left their home in Brookfield, Illinois intending to drive to Wisconsin for a vacation. The collision causing the injuries here complained of occurred about 4:45 o'clock a.m. at the intersection of Hough Street and U. S. Highway 14. Plaintiff Gale Knittle was driving his automobile west on Highway 14 and defendant's police car was traveling north on Hough Street at the time of the accident. Hough Street is 34 feet wide south of the intersection and 18 feet wide north of it. Highway 14 has a two-lane concrete pavement. Both highways broaden out at the intersection and vehicular traffic is regulated by electrically controlled traffic signal lights. A gas station is located on the southeast corner of the intersection 61 feet south of the south edge of the pavement on Highway 14 and 50 feet east of the pavement on Hough Street. About two blocks east of the intersection Highway 14 turns from north to west. As plaintiff's car came around the turn two blocks east of the intersection the traffic signal light was red. When his automobile reached a point about one block or one and a half blocks away the traffic light turned green. Plaintiff proceeded west traveling about 35 or 40 miles an hour. About 10 or 20 feet east of Hough Street he saw defendant's police car 75 or 100 feet to the south, approaching the intersection at 65 or 70 miles an hour, and that it maintained this speed as it entered the intersection where the collision occurred.

Defendant contends that the trial court erred in refusing to grant his motion for peremptory instruction to find defendant not guilty, made at the close of plaintiff's case and again at the close of all the evidence, on the ground that at the time and place of the accident defendant was performing a governmental function as a police officer.

Defendant testified in substance that he was a police officer in the employ of the Village of Barrington; that he was familiar with the intersection; that on the morning of the accident while sitting in the police car he saw "a speeder taking off from the intersection of Main and Hough streets" about two blocks away; that as defendant approached the intersection the traffic lights of Highway 14 were amber; that he crossed the intersection at a speed of about 65 miles an hour "or a little better"; that he did not see the plaintiffs' car coming from the east until it was "within eight feet" of him; that while he was pursuing the alleged speeder, "the flicker lights, the bright lights, and the flasher lights" of the police car were burning; and that the red flasher light is on the front fender.

Chief of Police Baade of Barrington, called in behalf of plaintiffs testified that the defendant told him shortly after the occurrence that plaintiffs' car was "proceeding west slowly," and that the "flash" and siren on the police car were operating.

William Rehfield, a court reporter called in behalf of plaintiff, testified that at the taking of a pre-trial deposition defendant testified that his purpose in pursuing the alleged violator was to "find out whether he was speeding or not" and that he did not get close enough to the speeder in order to determine how fast he was traveling.

The question whether defendant at the time of the occurrence was exercising a governmental function presented a question of fact for the jury to determine. Plaintiff's testimony shows that no automobile traveling on Hough Street crossed the intersection as plaintiff's automobile was approaching it from the east. Some of defendant's testimony is self-contradictory. Defendant's testimony that he was pursuing an alleged speed violator stands uncorroborated. In support of his contention defendant relies strongly on Taylor v. City of Berwyn, 372 Ill. 124. There the uncontroverted evidence showed conclusively that the police squad car involved was at the time of the accident being operated by a police officer in the performance of his duty as a police officer of the city. In the case at bar the evidence that defendant at the time of the accident was in the performance of his duty is conflicting and inconclusive. Plaintiff insists that the speeding automobile defendant says he pursued was "a figment of the defendant's imagination." We think plaintiffs' evidence was ample to warrant a finding by the jury that defendant at the time of the collision was on a personal mission and not in the performance of a governmental function as a police officer of the village. The peremptory instructions were therefore properly refused.

Defendant complains of the court's refusal to withdraw from the consideration of the jury Count Two which charges defendant with willful and wanton conduct. Plaintiffs' evidence tends to show that defendant ran through the red traffic signal light at the intersection while traveling at a speed in excess of 65 miles an hour; that the "flasher" light on defendant's car was not operating, nor was the siren sounded. In our opinion the evidence was sufficient to justify the jury in finding that defendant's actions at the time of the occur-

rence constituted willful and wanton conduct. (La Cerra v. Woodrich, 321 Ill. App. 107.)

Defendant maintains that his additional answer which was stricken by the court was vital to his defense. No prejudice could have resulted from the court's action in striking the additional defense since the record shows that evidence of this defense was permitted under the general answer. Moreover, defendant's position is untenable for the reason that the jury returned a general verdict and so far as the record shows defendant did not request a special verdict. The presumption is that where a general verdict is rendered without specifying the count on which it is based, the verdict is based on the count charging willful and wanton negligence rather than upon the count charging ordinary negligence. (Trumbo v. C. B. & Q. R. R. Co., 389 Ill. 213; Greene v. Noonan, 372 Ill. 286.)

Defendant contends that the verdicts are excessive. At the time of the accident plaintiff Gale Knittle was 45 years of age and employed as an engineer by a telephone company at a monthly salary of $550. He suffered multiple fractures of the ribs; his left collar bone was broken, and his lung was punctured. X-rays taken of the injuries more than a year after the accident show "an overlapping" of the collar bone, a definite deformity of the chest in that region, and "a thickening of the pleura; like scar tissue" which is permanent. Plaintiff testified that his ribs are very tender at times and that he seems to be "short of breath"; that his total losses, including his automobile, doctors' bills, hospital bills, and other bills, aggregate $2,351. Plaintiff Florence Knittle, wife of Gale Knittle, suffered a broken

rib and her knee developed a traumatic bursitis. Dolores Knittle had contusions of the scalp, abrasions of both knees, and injuries to her head which were diagnosed as a concussion of the brain. No contention is made that the jury were not correctly instructed as to the measure of damages, nor does it appear from the record that the verdict was the result of passion or prejudice. The question of damages is peculiarly one of fact for the jury. (Ford v. Friel, et al., 330 Ill. App. 136; Howard v. B. & O. C. Terminal R. Co., 327 Ill. App. 83.) From a careful examination of the record we cannot say that the verdicts are excessive, and therefore are not disposed to disturb them.

We have considered the other points urged and the authorities cited in support thereof but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

44611

HIGHWAY MUTUAL CASUALTY COMPANY, a corporation, Appellee, vs. THE AZTEC LINES, INC., a corporation, Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover premiums due on Workmen's Compensation and Employer's Liability policies. The court found that there is due plaintiff the sum of $1,895.98 and entered judgment for that sum against defendant. Defendant appeals.

The material facts are uncontroverted. Defendant is engaged in an interstate trucking business and employs many drivers who operate their own trucks. An audit was made of defendant's books by plaintiff's auditor. Afterward the parties stipulated as to the payrolls of various employees and the amount of premiums paid while the policies here involved were in force. The stipulation further provides that "there exists a difference of opinion between the parties as to the method of computing the amount of payroll of owner contractors to be used for the purpose of determining the premium due thereon for the periods from March 1, 1944 to March 1, 1945, and March 1, 1945 to May 11, 1945; plaintiff's contention being that the terms and provisions of the endorsement on the policy entitled "Hired Teams and Hired Automobiles Endorsement" should prevail; and defendant's contention being that the

union scale of wages for drivers of each owner contractor vehicle should prevail. Plaintiff's claim for premiums is based on a provision of the policy which reads:

> "HIRED TEAMS AND HIRED AUTOMOBILES ENDORSEMENT
>
> "In consideration of the provisions of the policy to which this endorsement is attached it is hereby understood and agreed that if motor vehicles including chauffeurs and their helpers are employed under contract and if the owner of such motor vehicles has not insured his compensation obligation and furnished evidence of such insurance, the actual payroll of the driver and helpers shall be included in the payroll of the insured employer at the proper rate for the operations for which they are engaged. If such payroll cannot be obtained, one-half (1/2) of the total amount paid for the hire of such motor vehicles under contract shall be considered as the payroll of the chauffeurs and helpers."

In arriving at the amount of payroll of owner contractors for the purpose of determining the premiums due thereon defendant allocated amounts on his books substantially as follows:

Reed	$12.25	$37.50	$49.75

Reed was one of the owner contractors who received the sum of $49.75 for hauling freight from Chicago to Cleveland. Defendant insists that $12.25 represented the identical wage which a union driver not having his own truck would receive for the same service and the balance of $37.50 was for rental of the truck and included gas, oil, tires, repairs, and other expenses. Owner operators such as Reed were paid a total sum of $49.75 in one check. Defendant says that the Interstate Commerce Commission required it to keep a record of the amounts paid to "over-the-road" drivers, and that defendant considered this method "a convenient basis for computing premiums for Workmen's Compensation," and further that there was a tacit agreement between defendant and the owner-contractors that they were

being paid the union scale for their services.

On the other hand, plaintiff argues that a theoretical payroll or "conventional or convenient payroll" does not comply with the foregoing provision of the policy requiring an "actual payroll."

Defendant admits that the Interstate Commerce Commission did not direct it to allocate any specific sum as wages of contractor owners. It also concedes that it owes plaintiff premiums, based on its theory of wage allocation, in excess of those already paid, but has failed to compute for or tender to plaintiff any premiums due it. The policies provide a formula for computing the payroll of contract owners in the event the insured fails, as here, to keep actual payroll records for such contract drivers.

We think the trial court was therefore justified in entering judgment herein based on the "Hired Teams and Hired Automobiles Endorsement." The language of this provision is clear and unambiguous. The principles applicable to the interpretation and construction of insurance policies do not differ from those which govern other contracts. (Old Colony Life Ins. Co. v. Hickman, 315 Ill. 304.)

Defendant contends that the owner operators driving their own trucks are employees and not independent contractors to which the "Hired Teams and Hired Automobiles Endorsement" refers. Illinois Revised Statutes 1947 (State Bar Asso. Ed.), ch. 48, secs. 139 to 142 inclusive, provides in substance that the defendant being engaged in the business of a carrier is liable to "every person in the service of another under any contract of hire" (Sec. 142(2).

In our view the language of the "Hired Teams and Hired Automobiles Endorsement" provision of the policy embraces all motor vehicles employed under contract.

We have considered the other points urged and the authorities cited in support thereof but in the view we take of the case we deem it unnecessary to discuss them.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., AND KILEY, J., CONCUR.

44623

GRACE ROSSMAN, Appellee,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
ALEX SOLWAY, Appellant.	)	

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant seeks to reverse a judgment for $3,000 entered on the verdict of a jury in an action to recover damages for personal injuries resulting from a collision between defendant's automobile and an automobile in which plaintiff was a passenger.

The collision occurred at about ten o'clock on a morning in February, 1945, at the intersection of Ogden and Sacramento avenues in the City of Chicago. At the time of the occurrence plaintiff was riding in an automobile owned and operated by her husband, Edward J. Rossman, a physician and surgeon.

The question of defendant's liability is uncontroverted. Defendant contends that certain questions propounded in the examination of the jurors on their voir dire, and other conduct of plaintiff's counsel during the trial, were highly prejudicial. The questions complained of are as follows:

> (1) Do you have any close friends or relatives, Mr. Jackson, who are now connected with any claim department of any company? Do you have anyone that you know of who ever did that kind of work?

(2) Mr. Fritz, does your firm do any work for the companies that are customarily interested in companies of this kind? Have you any friends or relatives with any claim department? In other words, that would eliminate at least close friends whose work you would probably know about. Have you anyone that you know of who ever did that type of work to your knowledge.

(3) Let me ask all four of the jurors in the second panel, all four of you ladies, whether any of you have ever been connected with any claim department of any kind. Have you any friends or relatives who have ever done that kind of work, so far as you know.

(4) (Addressing all four members of the third panel of the jury, the following question was asked). I was just going to ask all four of you jurors whether any of the four of you have any close friends or relatives who have ever been connected with any claim department or done any claim work.

Defendant says that plaintiff's reference in the foregoing questions to "claim department of any company," and "claim department of any kind" intimated to the jury "the presence of an insurance company behind defendant." Defendant relies on Wheeler v. Rudek, 397 Ill. 438. In our opinion the questions asked of the jurors, which the court found objectionable in that case, are substantially different from those here complained of.

We think it is a matter of common knowledge that many companies located in the metropolitan area of Chicago, other than insurance companies, maintain claim departments and that persons employed in the investigation and settlement of claims frequently are so defense-minded as to render them unsuitable for jury service.

The evidence shows that on direct examination plaintiff and her husband, Dr. Rossman, testified that plaintiff "at the request of representatives of the defendant" was

examined by Dr. Thomas Browning. Defendant objects to the use by plaintiff's counsel of the term "representatives of defendant" on the ground that it might suggest to the jury that an insurance company was involved. This objection is without merit. Dr. Browning did not testify that he was employed by an insurance company to examine plaintiff, nor did defendant object to the questions and answers in which the term "representative" of defendant was used. (Kiewert v. Balaban & Katz Corp., 251 Ill. App. 342.) To the same effect is Williams v. Matlin, 328 Ill. App. 645.

The record shows that the complaint filed herein consists of two counts. Count 1 alleges negligence, and count 2 willful and wanton conduct. Count 2 was dismissed. During the argument plaintiff's counsel stated to the jury, "This is only a civil suit for damages. We are not trying to punish anybody. We dismissed the willful count. You do not have to worry about the payment of the judgment." Defendant insists that this line of argument hinted to the jury that someone other than the defendant would pay any judgment entered against him. In the light of the charges in the complaint and the subsequent dismissal of count 2 we do not think that the jury could necessarily imply that an insurance company would assume the burden.

Finally defendant contends that the verdict is contrary to the manifest weight of the evidence and excessive in amount.

Dr. Edward Rossman, called in behalf of the plaintiff, testified that he is a physician, that at the time of the accident he was driving his automobile, a two-door Buick

roadster, from his home in Aurora to Chicago, accompanied by Mrs. Norvell and plaintiff who were seated beside him; that at the intersection of Ogden and Sacramento avenues "a terrific force of some kind hit us at the back," driving his automobile over a 12-inch curb and on to the sidewalk; that shortly after the collision plaintiff complained about her neck being "awfully sore" and of her back; that about three o'clock in the afternoon of the day of the occurrence the witness took the plaintiff to Dr. Paul A. Davis for treatment; that she returned to her home and remained in bed for ten days or two weeks; that the witness, in accordance with the directions of Dr. Davis, gave salicylate therapy, and diathermy treatments; that at the suggestion of Dr. Davis plaintiff was examined by Dr. Compere; that Dr. Compere ordered a Magnuson brace which she has worn ever since.

Dr. Paul A. Davis testified that he examined the plaintiff on the day of the accident; that he made a diagnosis of the sprain of the <u>erector spinus</u> muscle in the region of the neck; that there was a "muscle spasm" in the lower region of the back; that he made a diagnosis of a "ligamentous tear in the right sacroiliac area"; that "these injuries of the neck and of the lower back could be caused by an injury"; that he saw plaintiff twenty or thirty times in the course of the year or fourteen months following the accident.

Dr. Edward Compere, called in behalf of the plaintiff, testified that she was suffering from traumatic arthritis; that he prescribed diathermy, massage, and a corset-type of back brace to support the sacroiliac joints; that when he last examined the plaintiff on December 8, 1947 she was still

wearing the brace and that in his opinion if there was no recovery over a period of a year or two her condition "will continue to cause disability."

Plaintiff testified that shortly after the injury she was treated by Dr. Davis and then confined to her home for about ten days or two weeks; that she employed "sitters" for the children and had a woman come in to help with the housework for several months after the accident; that she is no longer able to do the heavy housework such as cleaning, washing and ironing; that she began to wear a surgical belt to give her back support about a month after the accident; that thereafter she wore the brace weighing about eight pounds as recommended by Dr. Compere.

Dr. Thomas C. Browning, called in behalf of the defendant, testified that he took X-rays of the plaintiff; that an examination of the X-rays showed no abnormality, "no evidence of fracture, dislocation, and no signs of injury"; that the tearing of muscles and ligaments in and around the sacroiliac joint would not necessarily show on X-rays.

Dr. N. S. Zeitlin, testified in behalf of defendant that an examination of the X-rays disclosed "a mild degree of arthritis, typical for an adult person, in the sacroiliac joint, and no other pathology.

While the testimony of the doctors is conflicting, we think the jury could find that plaintiff sustained a severe injury to her back as a result of the collision. The question of damages is one of fact for the jury. (Ford v. Friel, 330 Ill. App. 136.) On the record before us we cannot say that the verdict is against the manifest weight of the

evidence with respect to the injury. Neither do we find that the verdict is excessive. The trial court and the jury who heard and saw the witnesses were in a better position than this court to determine the weight of the testimony and the credibility of the witnesses.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J., AND KILEY, J., CONCUR.

44646

ALBERT H. DUNLAP, Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
IVORY HORTON, Appellee.	)	OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer to recover possession of Apartment A, third floor front, in the premises commonly known as 712 East Fiftieth Place, in the City of Chicago.

January 16, 1948, by agreement between the parties, a judgment was entered waiving trial by jury, finding the defendant guilty of unlawfully withholding possession from the plaintiff and staying the writ of restitution to July 15, 1948.

July 13, 1948 defendant filed a petition alleging in substance that plaintiff represented to the court that he intended to occupy the premises for his own use; "that the defendant now knows and has ascertained that the plaintiff does not desire the premises for his own use and occupancy"; that the representation of the plaintiff to the court that plaintiff "wanted the premises for his own use was a willful fraud perpetrated upon the court; that it was an erroneous fact which was made the basis for the court's judgment in this cause; that had the court known at the time of the entry of such judgment that said fact was false as recited

herein, the court would not have entered the judgment it entered." The petition concluded with a prayer that the judgment be vacated, the writ of restitution be quashed and a new trial granted.

July 20, 1948 plaintiff filed a motion to strike the petition on the ground that the petition filed under section 21 of the Municipal Court Act will not lie.

July 30, 1948 the trial court entered an order sustaining the motion to strike, granting the motion for a new trial, and transferring the cause to the Chief Justice for reassignment.

Afterward, on August 9, 1948, the trial court entered an order which recites, among other things,

" * * * that the record in this cause be, and the same is hereby corrected to show that the Motion of the PLAINTIFF to strike the Petition of the Defendant in the nature of a Writ of Error Coram Nobis, as to errors of fact, is SUSTAINED.

"IT IS FURTHER ORDERED that the record be corrected to show that Defendant's Motion under Section 21 of the Municipal Court Act, to vacate the judgment heretofore rendered in this cause on, to-wit: January 16, 1948, because of alleged fraud, be and the same is hereby sustained, and the said Defendant is hereby granted a new trial, and said cause is transferred to the Chief Justice for re-assignment.

"IT IS FURTHER ORDERED that on the Court's own Motion the Defendant be granted a new trial."

The judgment shows on its face that it was entered by agreement. "It does not purport to represent the judgment of the court but merely records the agreement of the parties." (Sims v. Powell, 390 Ill. 610.) A judgment entered by consent cannot be reviewed by appeal or writ of error. (Sims v. Powell; Bergman v. Rhodes, 334 Ill. 137.) For the purpose of plaintiff's motion to strike, all the facts well pleaded in

defendant's petition are admitted. (Stenwall v. Bergstrom, 398 Ill. 377.) Defendant says, "The court inspected its minutes" and having "fully advised itself in the premises ruled that plaintiff had perpetrated a fraud." What the court's "minutes" show does not appear in the record, nor are they material.

Plaintiff's motion to strike presents a question of law. In considering plaintiff's motion the trial court is restricted to the facts alleged in defendant's petition. These allegations, as defendant concedes, are clearly insufficient to vacate the judgment, for the reason that it was entered by agreement.

For the reasons stated, the order of August 9, 1948, vacating the judgment and granting a new trial, is reversed, and the cause is remanded with directions to enter judgment for plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS

BURKE, P. J., AND KILEY., CONCUR.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A.D.1949

GENERAL NO.9611 AGENDA NO.2

LOUIS F. GILLESPIE, as Successor Receiver of Hancock County Mutual Life Association, Plaintiff-Appellant,	Appeal from
vs.	Circuit Court of
F. J. REU, DALE F. SCOTT, FRANK HOUSTON, T.B. STEWART, RUTH M.WITT, as Executrix of the Estate of John B. Johnson, deceased, Defendants-Appellees.	Hancock County

337 I.A. 213

Wheat, J.

Plaintiff Louis F. Gillespie, as Receiver of the Hancock County Mutual Life Association, appeals from an order dismissing his suit against defendants, who were officers and directors of such association. The action was commenced by the filing of complaint at law on December 13,1944 as General No.12794 charging defendants with mismanagement, diversion of the funds and property of the association, and destruction of the business of such association. Defendants filed motions to dismiss the action and to strike the complaint on numerous grounds, one of which was that the cause of action was barred by a prior judgment and adjudication between the same parties in Chancery Case No.7070, by orders dating December 15, 1943 and June 21,1944. These motions were granted, the suit dismissed, and this appeal follows.

It appears that plaintiff had theretofor instituted an action in Chancery against the same defendants, the second amended complaint having been filed February 11,1941. Motions to strike the second amended complaint were allowed on October 5,1943, and on December 15,1943 a final order was entered dismissing the suit at plaintiff's costs. On January 14,1944 plaintiff moved to set aside such order of dismissal and for permission to file a Third Amended Complaint at Law which was tendered. This motion was denied June 21, 1944. No appeal was taken from either the order of December 15,1943 or that of June 21,1944.

As to whether the issues in the second suit now before us, No.12974, became res judicata by reason of the final and appealable orders dated December 15, 1943 and June 21,1944 in the former suit No.7070, it is

first necessary to consider whether the parties and the subject matter in both suits were the same. Plaintiff, himself, settles this by his statement in paragraph six of his complaint in Cause No. 12974 wherein this appears: "He brings this suit against the same defendants as the defendants in said cause No. 7070-C and for the same causes of action as those in said cause No. 7070-C". An analysis of the pleadings in both cases confirms the correctness of this statement.

Plaintiff then urges that the orders of December 15, 1943 and June 21, 1944 amounted to no more than a non-suit, whereby he might legally thereafter file the instant action. In the former suit, motions by all defendants were filed asking that the second amended complaint be stricken and the cause dismissed. The motion of the defendant Reu was complete and exhaustive, requiring 21 pages of the abstract of the record; that of the other defendants required 13 pages of such abstract. On October 5, 1943 the trial court ruled on such motions and made the following order: "This day come the parties to this cause by their attorneys, and this cause again coming on for hearing on the motion to dismiss the second amended bill, and the court having heretofore heard the arguments of counsel and being fully advised, it is ordered by the court that said motion to dismiss the second amended bill, be and the same is hereby sustained." Thereafter of December 15, 1943 the following order was entered: "This day this coming on for a consideration and it now a pearing to the court that plaintiff's attorney herein was furnished with a written copy of the court's finding in allowing the motions to dismiss this cause on October 5 last, and having up to this time taken no further steps in the matter, the court finds that said suit should be dismissed for want of equity at plaintiff's costs. It is therefore ordered, adjudged, and decreed by the court that said suit be and the same is hereby dismissed for want of equity at laintiff's costs. It is further ordered that the clerk of this court on this day mail to J. Edward Jones, attorney for plaintiff in this cause, at his office at No. 69 W. Washington St., Chicago, Ill. a copy of this decree by registered mail with return receipt demanded". This was a final and appealable order from which no appeal was taken.

Thereafter on January 14, 1944 plaintiff presented a motion asking that the order of December 15, 1943 be vacated, alleging that the motions to

dismiss on which the order of October 5,1943 was entered based,were in the nature of demurrers;that the order of December 15 was contrary to equity and law in that the court did have jurisdiction to furnish relief as alleged in the second amended complaint;that plaintiff wished to file a third amended complaint at law which was then tendered with request for leave to file.On June 21,1944 the court denied the motion to vacate and for leave to file a third amended complaint at law. No appeal was taken from this order.As such tendered third amended complaint at law was substantially the same as the complaint now before us in the instant case,it amounted to a finding that such tendered third amended complaint was insufficient in law to state a cause of action.The net effect of all of such rulings,that is, that of June 21,1944,that of December 15,1943,and that of October 5,1943 was to hold that in neither his chancery action nor in his proposed action at law by amendment,did plaintiff make a proper showing as to having a cause of action.If he believed the contrary his duty was to appeal.Instead of so doing he waited until December 13,1944 to file the pending action at law,the complaint in which is substantially the same as the tendered third amended complaint at law in the previous case.The acts complained of were alleged to have occurred prior to 1935.As was said in the case of Stoll v. Gottlied,305 U.S. 165,59 Sup.Ct. 134;"It is just as important that there should be a place to end as that there should be a place to begin litigation."

In the case of Doner v. Phoenix Land Bank,381 Ill.p. 106,it appears that an order was entered October 7,1941 dismissing on motion a second amended complaint.On November 10,1941 an order was entered dismissing the suit at plaintiff's costs,from which order an appeal was taken.The court said:"The contention that the order dismissing the suit was not on the merits because the record fails to show that plaintiff elected to stand by his complaint, cannot be sustained***.The general order of dismissal rendered all the issues thereby raised res judicata." In the case of Midlinsky v.Rubin,341 Ill.p. 378 it is said:"Appellant argues that the demurrer was sustained on account of defective pleading and not on the merits.The demurrer was general and special and the decree of the chancellor and the opinion of the Appellate Court disclose that the demurrers were treated as going to the merits.Certain it is

that appellant cannot successfully argue that a decree against one ground of relief is not res judicata of a claim arising on another bill, where the two bills, so far as the essence of facts and prayer is concerned, are substantially the same, The chancellor in this case did not err in sustaining the plea of res judicata". In the case of Klug v. Russel, 353 Ill. 179 the court found that the dismissal of a prior suit upon demurrer was a good defense to a subsequent suit as res judicata and said: "The decision of the former case was upon the merits, and the fact that it was rendered upon a demurrer is immaterial."

In this court plaintiff has filed a motion that the Third Amended complaint at Law, tendered in case No.7070-C be stricken from the record and the additional abstract thereof, which motion was taken with the case. In the praecipe for record on appeal, plaintiff has requested that certain of the pleadings in said cause No.7070-C be included in the record, which was done. For a proper determination of the issues it was proper and essential that such tendered Third Amended Complaint be included in the record, to make intelligible those portions of the proceedings selected by plaintiff. One taking an appeal ought not to be permitted to pick and choose such matters of record favorable to his contentions and exclude those other matters explanatory thereof, which may be adverse to him. The motion is denied.

It is the opinion of this Court that the judgment of the trial court in the former action constituted a complete defense to the present action, and the trial court therefore, did not err in sustaining the motions to strike and denying leave to file additional amendments. The judgment of the Circuit Court is affirmed.

Affirmed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A.D. 1949

GENERAL NO.9612 AGENDA NO.3

LOUIS F. GILLESPIE, as Receiver of the Hancock County Mutual Life Association, Plaintiff-Appellant,	)	Appeal from Circuit Court of Hancock County
vs.	)	
F. J. REU, Defendant-Appellee.	)	

Wheat, J.

Plaintiff Louis F. Gillespie, as Receiver of the Hancock County Mutual Life Association, appeals from an order dismissing his suit against defendant, who was an officer of such Association. The issues in this case are identical with those in the case of Gillespie v. Reu, General No.9611, decided by this Court at this term, (page ___ ante), which opinion controls our decision in this case.

The judgment of the Circuit Court is affirmed.

Affirmed.

44363

JOSEPH S. GORMAN,
Appellee,

v.

WALTER R. RENKOSIAK and ALFREDA C. RENKOSIAK,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Joseph S. Gorman, plaintiff, filed his verified statement of claim against Walter R. Renkosiak and Alfreda C. Renkosiak, defendants, in which he alleged that he was entitled to the possession of certain premises in the City of Chicago, known as Apartment 2, 4418 N. California avenue; that he desires said apartment for his own use and that defendants unlawfully withhold possession thereof from him, and he claims possession of the property. There was a hearing before the court and there was a finding that defendants were guilty of unlawfully withholding from plaintiff the possession of the premises, and that the right to the possession of the premises was in plaintiff; that plaintiff have judgment on the finding and recover from defendants the possession of the said premises, and that a writ of restitution issue therefor; that the writ of restitution be stayed for ninety days. A motion to vacate the judgment order was denied. Defendants appeal.

Defendants contend that they "were not permitted to introduce in evidence their side of the issues, and there was no trial on the merits of the case"; that the record "is confusing and mostly devoted to argument, discussion and bickering between court and counsel," but defendants admit "there is sufficient evidence in the record to show

what really occurred." We do not find in the record any complaint made by counsel for defendants as to the manner in which the case was tried, and it is clear that they took an active part in the "argument, discussion and bickering."

The record shows the following facts: That defendants were the owners of the building in which the premises in question are located, and that on March 26, 1947, they conveyed the building, by warranty deed, to Victoria Gordon, a widow; that on February 1, 1947, Victoria Gordon executed a written lease to defendants, Walter R. Renkosiak and Alfreda C. Renkosiak, of the apartment in question for a term commencing February 1, 1947, and expiring February 1, 1948, at $50 a month; that this lease was signed by Victoria Gordon and the Renkosiaks; that on March 24, 1947, Victoria Gordon and Joseph S. Gorman, plaintiff, entered into a written contract by the terms of which Victoria Gordon agreed to sell and convey to Gorman the building in question. Plaintiff offered in evidence a deed from Victoria Gordon to plaintiff of the building in question, but defendants then admitted title in plaintiff and the deed, while admitted, does not appear in the report of proceedings.

At the conclusion of plaintiff's evidence the attorney for defendants made "a motion for a directed finding on the testimony of the plaintiff that the written lease was in full force and effect until February 1st, 1948, and he has accepted rent under the terms thereof." The attor-

ney for plaintiff called the attention of the court to the fact that the lease from Victoria Gordon to the Renkosiaks was dated February 1, 1947, and that the warranty deed from the Renkosiaks to Victoria Gordon, a widow, was not executed until March 26, 1947, and the attorney argued that as the Renkosiaks owned the property at the time the lease was executed to them it was void, and was, in fact, a fraud upon plaintiff; that Victoria Gordon did not execute the agreement to sell to plaintiff until after she had executed the lease to the Renkosiaks; that as soon as plaintiff discovered, from an examination of the tract record, that the Renkosiaks had title at the time the lease was executed to them he refused to recognize it. The trial court then announced that he would enter a judgment order in favor of plaintiff but would allow defendants to enter a motion to vacate the judgment order. Thereupon the attorney for defendants stated that he wanted an opportunity to submit evidence to the effect that the deal between the Renkosiaks and Victoria Gordon was consummated in September, 1946, and that a deed was executed at that time but not recorded. Thereupon the trial court continued further hearing of the cause until October 30, 1947. When the case was called for hearing at that time the record tends to show that the attorney for defendants made an unsuccessful effort to have the record show that they wished to submit evidence but that the trial court refused to hear it. The trial court had postponed further hearing to enable the attorney for defendants to bring in whatever evidence he wanted to offer at that

time. When the hearing was resumed the attorney for defendants again made an unsuccessful effort to have the record show that the court was denying him an opportunity to present evidence, but the trial court asked him several times if there was any additional evidence that they wanted to introduce, but defendants failed to offer any. The contention of defendants that they were denied an opportunity to offer evidence is without the slightest merit. It seems clear that what the counsel for defendants really sought was to interject some statement into the record upon which they might make a claim in this court that they were denied an opportunity to present evidence. We may say that upon the oral argument in this court counsel for defendants admitted that they were unable to produce the alleged unrecorded deed of September, 1946.

The term of the lease from Victoria Gordon to the Renkosiaks expired February 1, 1948. In their brief defendants concede that their lease "terminates on February 1, 1948, the plaintiff would then have a right to proceed against the defendants to have them vacate the premises in accordance with due process of law." The purpose of this appeal is obvious, and it is high time that defendants surrendered possession of the apartment to plaintiff. It is conceded that a feeling of animosity has developed between the parties to this suit and that fact has undoubtedly protracted the instant litigation.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

44519

DANIEL GAINES, Appellant,	)	
v.	)	APPEAL FROM SUPERIOR
ELMER M. WALSH, Sheriff of Cook County, Illinois, and ELIZABETH SMITH, Intervening Petitioner, Appellees.	)	COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Daniel Gaines, plaintiff, filed a complaint against Elmer M. Walsh, Sheriff of Cook County, Illinois, in which he sought to enjoin the sheriff from maintaining a levy upon certain personal property belonging to plaintiff and from selling the said property. He appeals from a decretal order that denies him a temporary or permanent injunction and dismisses his complaint for want of equity. The complaint alleges that the sheriff, on April 6, 1948, made a levy on the personal property of plaintiff by reason of an execution issued by the Superior court of Cook county in case No. 44-S-11809, "in which execution the plaintiff was named as one of the joint debtors and the amount of the judgment was in the sum of $1,509.07 plus interest and cost or a total of $2,179.49"; that plaintiff, on April 7, 1948, "gave written demand to the defendant that he levy upon the following described real estate which is owned exclusively by the plaintiff and is of the value of $12,000.00 and is unencumbered and is not the plaintiff's homestead." (Here follows a description of two parcels of real estate.) The complaint further alleges that notwithstanding the written demand made upon the sheriff to first make his levy upon the real estate owned by plaintiff, defendant is maintaining his deputies

upon the premises wherein plaintiff is conducting his business and is threatening to sell all of the personal property which belongs to plaintiff. The complaint prays that the sheriff be restrained during the pendency of the suit from maintaining the levy upon the personal property belonging to plaintiff and from in any manner interfering with or preventing plaintiff from conducting his business. The sheriff was the sole defendant named in the complaint and the only relief sought was against that official. Several days after the filing of the complaint Elizabeth Smith, the plaintiff in said case No. 44-S-11809, was allowed to file an intervening petition in the instant cause, in which she prayed that the injunction sought by plaintiff be denied, and she set up certain grounds in support of her prayer. The principal ground urged was that plaintiff had waived any right to demand that his real estate be sold before his personal property, by his failure to make such demand when on August 19, 1946, he was notified by execution served upon him, or within a reasonable time thereafter. The report of proceedings shows that there was a hearing before the chancellor upon a motion by plaintiff for a temporary injunction; that at the time of the hearing the sheriff had not been served with a summons in the cause, had not entered an appearance, and that he did not participate in any way in the hearing upon the motion. Counsel for the intervening petitioner appeared and participated in the hearing. The sheriff has taken no part in the proceedings in this court upon the appeal. The greater part of the report of proceedings is taken up by colloquies between the chancellor and counsel and between counsel. Plaintiff offered evidence

to show that the day after the levy was made upon his personal property he served the written demand, heretofore referred to, upon the sheriff. It appears that on August 2, 1946, an execution issued upon the judgment obtained by the intervening petitioner in said case No. 44-S-11809 and that it was served on plaintiff on August 19, 1946. It is conceded that plaintiff ignored that execution, that on November 1, 1946, the sheriff made a return upon that execution, "no property found and no part satisfied," and that on March 2, 1948, the intervening petitioner caused another execution to issue on the said judgment and that it was upon that execution that the sheriff made his levy upon the personal property of plaintiff. After certain evidence had been offered at the hearing the question arose as to whether plaintiff had waived his right to demand that his real estate be sold before his personal property by the fact that he ignored the first execution, and lengthy arguments were made by counsel for plaintiff and counsel for the intervening petitioner upon this question, after which the chancellor decided that the contention of the intervening petitioner that plaintiff had waived his right was a meritorious one. As counsel for plaintiff conceded that plaintiff's case rested upon the theory of law that plaintiff did not waive his right to demand that his real estate be first taken because he ignored the first execution, the chancellor then concluded to enter the decretal order in question. The intervening petitioner strenuously contends that the decretal order was entered by consent of the parties, and the record tends to support the contention. However, counsel

for plaintiff insists that what he meant by the language cited by the intervening petitioner in support of the contention was that in view of the conclusion of the chancellor upon the controlling question the proper order to be entered by the chancellor was to dismiss the bill for want of equity. It is unnecessary, however, to pass upon the contention of the intervening petitioner. We have presented here an anomalous situation - a decretal order entered by the chancellor that disposed of the complaint upon the merits and dismissed it for want of equity, although the sheriff, the only defendant named in the complaint, had not been served with summons, had not entered an appearance, and had taken no part in the proceedings. For some reason not disclosed by the record the chancellor, in the decretal order, ordered that the petition of the intervenor "stand as her answer to the complaint <u>and in lieu of an answer by Elmer M. Walsh, Sheriff of Cook County.</u>" It is hardly necessary to say that jurisdiction of the sheriff could not be obtained in that way. The intervenor contends in this court that the decretal order was entered at a time when the court had no jurisdiction of the sheriff and that the appeal must be dismissed upon that ground alone. Plaintiff, in his brief in this court, makes no attempt to dispute the plain fact that the trial court had no jurisdiction of the person of the sheriff at the time of the entry of the decretal order. Upon the hearing in this court of the intervening petitioner's motion to dismiss the appeal, counsel for plaintiff conceded that the trial court had no jurisdiction of the sheriff at the time of the entry of the decretal order. Upon the said hearing it developed that some days after the levy in question the

sheriff acceded to the demand of plaintiff and released the levy upon the personal property; that the sheriff then levied upon the two parcels of real estate tendered by plaintiff, sold the same, and received at the sale $1,000 for the property; that the $1,000 was applied upon the judgment of the intervening petitioner, in case No. 44-S-11809; that plaintiff then paid to the sheriff the balance due upon the said judgment, and that that judgment has been satisfied in full.

The grounds urged by the intervening petitioner in support of her motion that this appeal be dismissed are: (1) that the trial court had no jurisdiction of the sheriff at the time the decretal order was entered, and (2) that the complaint was dismissed by consent of plaintiff. The first ground is undoubtedly sound. The only objection to the dismissal of the appeal urged by counsel for plaintiff is that plaintiff intends to sue the sheriff for damages for levying upon his personal property, and that in such proceeding the main question will be, was the sheriff justified in levying upon the personal property of plaintiff; that upon the instant appeal plaintiff asks this court to pass upon that question and plaintiff would like a decision by this court upon that question before proceeding against the sheriff. It would seem hardly necessary to say that the objection urged by plaintiff to the dismissal of the appeal has no merit. It must be understood that we are not intimating any opinion upon the question of the alleged waiver by plaintiff.

The instant appeal must be dismissed, and it is accordingly so ordered.

APPEAL DISMISSED.

Sullivan, P. J., and Friend, J., concur.

44670

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

WALTER DONALD O'BRIEN,
Plaintiff in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An indictment containing three counts was returned against Walter Donald O'Brien, defendant. The first two charged burglary, but the trial court stated that the People "waived" these counts. The third count charged that defendant, on February 26, 1948, "feloniously, unlawfully, wilfully, mischievously and maliciously did injure and deface a certain building there situate, to wit: a dwelling house, then and there in the lawful possession and control of Charles Stransky, then and there occupied by said Charles Stransky as a dwelling house, then and there commonly known as Number Six Thousand Eight Hundred Forty-six West Sixteenth Street in the City of Berwyn, * * * and then and there owned by said Charles Stransky, and certain fixtures in said building, to-wit: dwelling house, by then and there prying open a certain door of said building and by breaking certain hooks on said door, without then and there having the consent of said Charles Stransky," contrary to the statute, etc. Defendant plead not guilty, waived a jury, and submitted the cause to the court for trial. Defendant was found guilty of the charge in the third count and sentenced to the County Jail for one year. He appeals.

The prosecuting witness, Charles Stransky, testified that he was thirty-two years old; that he lived at 6846 West 16th street, Berwyn, with his wife and son, a baby; that he conducted an auto repair shop in the premises; that the place

is a one-story building with two stores and that he lives in the back of one of the stores; that he occupies three rooms, a kitchen, two bedrooms and a hall; that there are two entrances to the three rooms, one from the store and one from the back of the building; that about 6:30 A. M. on the day in question he heard some noise at the back door that woke him up, so he got dressed and said, "'Who was it?' In the meantime a man broke into the door." The witness identified defendant as the man. Stransky further testified that defendant broke "through the outside door to the kitchen"; that he saw the man entering; that "then I saw it was not a customer or any friendly, and anything friendly, so I says, 'Who are you, what do you want?' He didn't say anything, just looked around and walked further in, so I said, 'What do you want?' and he kept his hand in his coat pocket and aimed something at me and says, 'Put them up.' I says, 'Man, you are in the wrong place, we have no money, get out of here.' He kept pointing and looking toward me and said, 'Put them up, shut up and be quiet, you goof, put them up'"; that "I said, 'Please don't shoot, I have a wife and baby here'"; that "while I was putting my hands up, I was then in the way, I learned in the army defense, so I turned his hand against him, whatever he had * * * I did not see it * * *." The witness then stated that he served in the infantry, the air force, and in several foreign armies - the French Foreign Legion and French Army, British Army, Polish Army, Czecho-Slovakian Army in Exile, and in the United States Army during the last war. The following then occurred: "Q. What happened after what you already told His Honor? A. Then we

started to fight. * * * I was trying to force him out of the building, and he was against me, until finally I overpowered him and got him out of the door, and locked the door after him; and in the meantime while I was fighting with him, my wife picked up the phone and called the police. Then the minute I got him to the door I went back, put my cover-alls on, and followed him, went through the back yard and turned toward Grove Avenue in the alley." The witness then described the arrest of defendant by the police. The following then occurred: "Q. Was your door locked the night before, when you went to bed, Mr. Stransky? A. Yes, sir. Q. What kind of lock did you have on the door? A. It had two hooks. Q. Two hooks? A. Yes. Q. Was there a key in the lock? A. Yes. Q. I show you State's Exhibits 1 and 2 for identification and ask you whether that is the hooks and the bolt you had in your door? A. Yes. Q. You recognize these as yours? A. Yes. There is another spring. Q. And a spring? A. Yes. Q. Was that inside of the door or outside? A. Inside, it was all inside, there was no access from the outside. Q. Where were these exhibits laying when you got up that morning, Mr. Stransky, if you know, were they on the floor? A. No, one was hanging on the door, on the open door, and the other was hanging on the door sill, it was broken. * * * Q. You never gave your consent to pull those locks or bolts off of the door or the spring off of the door? A. No, sir." The witness then stated that he had never seen defendant before the night in question. Upon cross-examination the witness stated that there were two doors at the back of his house, a storm door and another

door; that there were iron bars on the outside door, an iron bar with a bolt from the inside; that the man took about ten steps or so into the house - about ten feet; that the witness asked him, "Who are you, what do you want?" that "He didn't say anything, walked a few steps and looked and then he put his hands in his pocket, pulled something out, and he come at me with his hands up. Q. He pulled something out of his pocket aimed at you? A. Out of his coat pocket. Q. And what was it he pulled out of his coat pocket? A. I don't know. Q. And then what did you do? A. I pleaded with him, I says, 'For Christ sake, Mister, please don't stay here, let's go away, you are in the wrong place.' * * * Q. So what did you do then? A. I was pleading with him, and he kept approaching me with that in his hand. Q. I see. A. He says, 'Put them up and shut up, you goof,' and several names he called me, I don't remember exactly every word. Q. And then what did you do? A. And when he got near enough, I made a dive for life. * * * There is such a thing as surprise in life, and I have been through it many times. * * * I grabbed his right hand where he had the object, and turned it against him, took him with me, caught his hands, and we started fighting. Q. What was this thing you saw in his right hand? A. If I knew I would name it exactly. Q. Well, describe it. A. I couldn't. You have no time to describe anything. I did not have time to look around waiting till this man comes at me when I had to keep him checked the best I could"; that when he pushed the man out he slammed the inside door; that the outside door was no good. An offi-

cer testified that he arrested the defendant about half a block from Stransky's place; that defendant had been drinking but was not intoxicated; that he smelled of liquor. Defendant testified that he was married on March 27, 1948; that on the evening in question he had been in a number of taverns and had been drinking at each; that he went into the tavern at 5700 West Roosevelt about two o'clock A. M. and left there a couple of hours later; that he was alone when he left that place; that he then stopped at another tavern but cannot tell the location of the same; that he remembers nothing further until he was in the police station; that he does not remember being in the Stransky house because he was too intoxicated to remember.

At the conclusion of the evidence the following occurred: "Mr. Lustfield [attorney for plaintiff in error]: Judge, I think all the evidence is in this case, and after going over the facts and the witnesses, I am more convinced now that this is the kind of case that should have been disposed of in the City of Berwyn on a City charge. I think the police officers had the right idea in the first instance when they wanted to charge the man with disorderly conduct and set the bond at $200.00. (Arguments by counsel) The Court: Now, this is a serious crime, a man entering another man's home, breaking into the home through forcible entry. If because he took a drink of whiskey he is not guilty, you might just as well throw out the whole Criminal Court and forget all about it. We know of cases where innocent men have gone into the neighbor's place and suffered the extreme penalty because of it. I think your man is very lucky this

citizen didn't take the law in his own hand. Mr. Lustfield: I want to say this, since [the night in question] this man has married, and he has taken the pledge, and he has been keeping it pretty good, drink was his fault in all the trouble, the man is now married after this happened and he has taken the pledge, is that right? The Defendant: Yes. The Court: Very well, there will be a finding of guilty on Count 3 of the indictment. Now, you want to offer some evidence in mitigation or aggravation? Mr. Lustfield: I think, Judge, you have all the facts as much as I can give to you. The Court: What about the record you are talking about? Let's see the record. Four months in the House of Correction for burglary; in 1935 you got 60 days in the House of Correction for tampering with an auto. Mr. Lustfield: 1935 — 13 years ago. The Court: Nine months in the House of Correction; in 1938 he was sentenced to Joliet, how much time did you spend there? The Defendant: Five and a half years. The Court: Transferred to Pontiac and paroled. For drunkenness and violation of parole; back in 1945 he got 60 days in the county jail, 60 days and a dollar fine, if you know drink affects you to that extent, why don't you stay away from it? The Defendant: I took the pledge. The Court: You can't come in here pleading intoxication after having this record. There will be a commitment to the county jail for one year. Mr. Lustfield: Judge, can't you cut that down, he is married now, and took the pledge, cut it down to six months. The Court: No, I can't. Except for the waiver by the State of the other two counts, I would have felt justified in holding him for burglary."

Defendant is an habitual criminal and he received more

consideration than he deserved when the People waived the two counts that charged burglary. The record shows that the sole defense interposed was that defendant was intoxicated at the time he committed the offense. At the time of the trial the experienced counsel for defendant simply pleaded with the trial court to cut the sentence from one year in the county jail to six months because defendant, after committing the offense in question, married and had taken the pledge, and "he has been keeping it pretty good"; that "drink was his fault in all the trouble." It is difficult for us to understand why the People, in the light of the criminal record of defendant, waived the two counts for burglary. As the trial court stated, defendant was lucky that Stransky did not take the law into his own hands.

The principal point made in support of this appeal is "that there is no proof of intent to injure or deface the building nor of any feeling of malevolence or revenge toward the owner thereof." Malicious mischief is the wanton or reckless destruction of or injury to property. If we assume, for the purposes of this appeal, that it was necessary for the People to show malice on the part of defendant, nevertheless, malice may be, and frequently must be, inferred from the nature of the act itself and from the circumstances which accompany and characterize it. In arguing that there is no evidence that defendant showed any feeling of malevolence toward Stransky counsel asks us to ignore the testimony of Stransky as to what occurred at the time in question because, counsel states, Stransky's testimony was merely an effort to dramatize an imaginary fight between

himself and defendant, and that we should find that defendant came to the back of Stransky's home thinking it was the rear entrance of a tavern and that he was merely "floundering around" in Stransky's home trying to get just one more drink. We are asked to forget the fact that defendant is an habitual criminal and to assume that drink was to blame for all of his troubles. As to the argument that there was no actual damage to the building or fixtures in the building, it is sufficient to say that counsel, in the brief filed, admits that defendant opened the outer door by pushing hard enough to pull the hooks eyes out of the door frame. Counsel, forgetting that he pleaded with the trial court to make the punishment six months in the county jail, concludes the brief filed by asking us to hold that the evidence is only sufficient to sustain "a drunk and disorderly charge," and that we should reverse the instant judgment without remanding the cause.

~~We feel impelled to say that we find no merit in the arguments advanced and that we should find that the record shows plainly that an habitual criminal has been treated too leniently.~~

There is no merit in this appeal. The record shows plainly that an habitual criminal has been treated too leniently.

The judgment of the Criminal court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

Gen. No. 10326 IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1948

WILBUR V. WILLMEROTH, Plaintiff and Appellee, vs HENRY C. NIENABER, Police Magistrate of the City of Peru, Illinois, Defendant and Appellant.	Appeal from Circuit Court, LaSalle County Hon. Roy Wilhelm, Presiding Judge.

337 I.A. 215

Bristow, J.

A complaint was filed in the office of the Circuit Clerk of La Salle County seeking recovery of the statutory penalty provided for in Section 36 of Chapter 79 of the Illinois Revised Statutes, 1945 Edition. It was therein provided that such penalty was recoverable in the event a Justice of Peace or Police Magistrate improperly refused to grant a change of venue.

The defendant in answering this complaint alleged, among other allegations, that"a change of venue had previously been granted to the defendant in said case of Willmeroth v. Olson by the Justice of the Peace before whom the original suit was instituted, so that this defendant, having received said case on a change of venue, was without jurisdiction to authorize or grant a second change of venue. The Statutory penalty provided for in said Section 36 is applicable only to a 'suit or proceeding instituted and then pending' before a Justice of the Peace or Police Magistrate who refuses to grant a change of venue, said Statutory penalty not being applicable to a suit pending but not instituted before such Justice of the Peace or Police Magistrate."

The appellee herein instituted a suit in forcible entry and detainer in the Justice Court of Chester Truskowski in the Township of Peru in the County of La Salle. The defendant in that proceeding then filed his peitition and affadavit seeking a change of venue from Judge Truskowski. The change of venue was allowed and the cause was transferred to the court of Police Magistrate Henry C. Niensber, present appellant. Thereupon, appellee requested a change of venue but was denied. The cause was then heard by Judge Nienaber who found the issues for the defendant.

Thereafter, this suit was brought in the Circuit Court of La Salle County. The Court heard this cause without a jury, found the issues for the plaintiff, and entered judgment for him in the sum of One Hundred Dollars ($100) and costs. This appeal followed and presents the sole inquiry as to whether appellant improperly denied appellees petition for a change of venue.

The two sections of the Statutes applicable to this inquiry appear in Chapter 79, Sections 34-36 of the 1945 Illinois Revised Statutes. They read as follows: 34; "Previous to the commencement of any trial before a justice of the peace, or police magistrate, either party, or his agent or attorney, may make oath that it is the belief of such deponent that the plaintiff or defendant, as the case may be, cannot have an impartial trial before such justice, or police magistrate, whereupon it shall be the duty of the justice or police magistrate, immediately to transmit all the papers and documents belonging to the action to the nearest justice of the peace in the same county, who is not of kin to either party, sick, absent from town, or interested in the event of the action, as counsel or otherwise, who shall proceed as if the action had been instituted before him. The distance as contemplated in this section shall mean to be by the nearest traveled route." 36; "Any justice of the peace or police

magistrate who shall refuse a change of venue in any suit or proceeding instituted and then pending before him, upon the proper application being made as provided for in this act, shall forfeit and pay to the person aggrieved, one hundred dollars, to be recovered by action of debt in any court of competent jurisdiction." It is interesting to observe that the 1947 Legislature passed an amendatory act which precludes any further question on the issue under consideration. It reads as follows: "Previous to the commencement of any trial before a justice of the peace, or police magistrate, either party, or his agent or attorney, may make oath that it is the belief of such deponent that the plaintiff or defendant, as the case may be, cannot have an impartial trial before such justice, or police magistrate; whereupon it shall be the duty of the justice or police magistrate, immediately to transmit all of the papers and documents belonging to the act on to the nearest justice of the peace in the same county, who is not of kin to either party, sick,absent from town, or interested in the event of the action, as counsel or otherwise, who shall proceed as if the action had been instituted before him. After one change of venue has been had under this Section and before the commencement of the trial before the justice of the peace to whom the case was transferred, the party who did not request the first change of venue, or his agent or attorney, may make oath that it is the belief of such deponent that the plaintiff or defendant, as the case may be, cannot have an impartial trial before the justice before whom the case is now pending, whereupon it shall be the duty of such justice immediately to transmit all the papers and documents belonging to the action to the nearest justice of the peace, excluding the justice before whom the action was originally brought, in the same county who is not of kin to either party, sick,absent from town, or interested in the event of the action, as counsel or otherwise, who shall proceed as if the

the action had been instituted before him. "The distance as contemplated in this section shall mean to be by the nearest traveled route."

As heretofore indicated, section 34 provides that "either" party may have a change of venue. Does "either" mean that just one party to a proceeding has a right to a change of venue or does it mean that such a right is extended to each party? We are of the opinion that the trial court was correct in his conclusion that the sensible, reasonable and just interpretation of the statute under consideration gave the appellee a right to have a change of venue from appellant.

Change of venue statutes must receive a reasonable construction to promote the ends of justice. Geo. Gregory Printing Co. v. DeVorey, 257 Ill. 399; Chicago, Burlington & Quincy Railroad Co. v. Perkins, 125 Ill. 127. The object in construing a statute is to determine and give effect to the legislative intent. To ascertain such intent courts shall take into consideration the whole act, the law as it existed prior to its passage, the changes made by the new act and the purpose for making such changes. The People ex rel. Shriver v. Frazier, 386 Ill. 620,624.

The case of Herbert v. Beathard, 26 Kans. 746, is the only case cited that determined the precise question involved in this appeal. The statute which the Kansas Court considered is almost identical with Section 34. In that decision it was held untenable the claim that because one party had already obtained a change of venue, no other change would be allowed.

Many authorites have been cited in the briefs of appellee and appellant giving the variable interpretations that have been given to the word "either" as it appears in different statutory enactments. We deem it unnecessary to burden this opinion by analyzing and applying or distinguishing each of those citations.

JUDGMENT AFFIRMED.

the action had been instituted before him, and did not a [illegible] contemplated in this section shall make [illegible] traveled route."

As heretofore [illegible] party may have a change of venue [illegible] one party to a proceeding [illegible] change of venue [illegible] lies it must [illegible] ties to the original [illegible] clusion that the [illegible] of the [illegible] under [illegible] have a change of venue [illegible].

Change of venue [illegible] strued [illegible] Co. v. Pedigo, 219 Ill. [illegible] R. R. Co. v. [illegible], 1. Ill. [illegible] stated [illegible] tent. [illegible] the changes [illegible] changes. [illegible]

[illegible] of Herbert v. [illegible] appeal. [illegible] able [illegible] change [illegible] allowed.

[illegible] and [illegible] given [illegible] enactments. We deem it unnecessary to [illegible] opinion by analyzing and applying or distinguishing each of those citations.

JUDGMENT AFFIRMED.

44258

WILLIAM JACKSON, Appellee,	)	
	)	APPEAL FROM SUPERIOR
v.	)	
	)	COURT, COOK COUNTY.
NICHOLAS ROMANCHUK, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

While crossing Western avenue near the intersection of Warren boulevard, in Chicago, on February 11, 1947, plaintiff was struck and injured by defendant's automobile. Plaintiff's suit for damages resulted in a verdict against defendant in the sum of $13,000.00. Motions of defendant for a directed verdict at the close of all the evidence and for judgment notwithstanding the verdict were denied, and judgment was entered on the verdict. Defendant appeals.

The accident occurred about six o'clock in the evening, after dark. Plaintiff, aged 62, was walking west on the north side of Warren boulevard. As he approached the intersection of Western avenue, the traffic light on the northeast corner was green for traffic moving east and west. As he stepped from the curb onto Western avenue, he looked across to the southwest corner and observed that the light was still green. He then proceeded west to the middle of the intersection, and when he reached a point between the two street-car tracks on Western avenue, the lights changed to amber. He testified that he then stopped at approximately the center of Western avenue on the north crosswalk of Warren boulevard, about six feet east of the safety island which was located beyond the south-bound car tracks on the western side of Western avenue. North and south-bound traffic, which had been standing on Western

avenue, started up when the light changed, and he stated that he did not continue to the safety island because south-bound automobiles in the car tracks on the east side of the safety island started up and got in his way. According to his own testimony, he then turned and left the north crosswalk of Warren boulevard, and walked north in Western avenue between the street-car tracks and the moving lines of traffic on Western avenue to a point 50 to 100 feet north of the crosswalk. When he reached this point he stood and waited for the south-bound traffic to pass in front of him, with the evident intention of finding a break in the traffic in order to walk across the balance of the street. He was thoroughly familiar with the intersection, and knew that traffic was heavy at that hour of the evening. While plaintiff was standing in the middle of the street, watching the south-bound traffic moving in front of him, and evidently without looking to the south, defendant's automobile struck and injured him.

It appears from the evidence that defendant was driving his automobile north on Western avenue. As he stopped for the red light on the south side of Warren boulevard, his car was straddling the east rail of the north-bound street-car track, and was third in line behind two other cars, with two other cars to his right. When the light turned green, he started up and drove north across Warren boulevard, still straddling the east rail of the north-bound street-car track, and he stated that there were about 15 to 20 feet intervening between the front of his car and the rear of the preceding automobile. He

stated that he was looking straight ahead, that his lights were on, and that his vision was not impaired; that as he was shifting into high gear, after crossing into Warren boulevard, plaintiff suddenly loomed up in front of him; that his speed at that time did not exceed 10 miles per hour; that he immediately applied his brakes and swerved to the left about 3 to 5 feet in an attempt to avoid hitting plaintiff, but that the right front fender of his car struck him. Policemen who appeared upon the scene later testified that the brakes and mechanism on defendant's car were in good order, and that the car could be brought to a stop within 17 feet traveling 20 miles an hour. One of the witnesses who appeared on the scene after the accident testified that plaintiff was lying across the west rail of the north-bound street-car track about 50 feet north of Warren boulevard, and that defendant's automobile was about 47 feet north of that street.

As grounds for reversal it is urged that plaintiff was guilty of contributory negligence as a matter of law; that there is no evidence tending to prove that defendant was guilty of negligence; that the verdict and judgment are contrary to the manifest weight of the evidence; that the court erred in instructing the jury; that it was reversible error for plaintiff's counsel to elicit information from one of the witnesses leading the jury to believe that defendant carried liability insurance; and that the award of damages was excessive.

In the view we take, only one of these questions needs to be considered. The evidence is uncontroverted

that plaintiff left the crosswalk before he reached the safety island, and proceeded north on Western avenue to a point varying between 50 to 100 feet, walking between moving traffic up the middle of Western avenue. He was obviously seeking a short cut to the west side of the street north of the intersection. He admitted that he did not observe defendant's automobile until it struck him. If, as plaintiff claimed, he was prevented by moving south-bound automobiles from continuing along the crosswalk the 6 or 7 feet to the safety island after the lights changed, he could have remained on the crosswalk until a break in the traffic permitted him to proceed.

These circumstances, taken in connection with the evidence that defendant was observing the traffic signal and following behind two other automobiles as he crossed Warren boulevard at a reasonable rate of speed, impel us to conclude that the verdict was against the manifest weight of the evidence both as to the alleged negligence of defendant and the alleged exercise of due care for his own safety on the part of plaintiff. Plaintiff argues that just before the accident he was standing slightly to the west of the middle of the car tracks, and that the proximate cause of the accident was defendant's negligence in driving slightly to the west of the center line of the tracks where plaintiff was standing. However, defendant testified that he was in the lane of north-bound traffic; that he did not cross over to the left until suddenly confronted by plaintiff's presence; and that he then swerved to the left in an effort to avoid the collision.

We think that justice will be served by a retrial of the cause. Since it will in all likelihood be retried, we deem it unnecessary to consider the other grounds urged for reversal.

For the reasons indicated, judgment of the Superior Court is reversed and the cause is remanded for a new trial.

Judgment reversed and cause
remanded for a new trial.

Sullivan, P. J., and Scanlan, J., concur.

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44315

ALICE VENTURELLI,
Appellant,

v.

CITY OF CHICAGO, a
Municipal Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Alice Venturelli, sued the City of Chicago for damages resulting from an injury sustained while walking upon an alleged defective crosswalk constructed by the city in front of her home. The jury returned a verdict in her favor in the sum of $6500.00. Thereafter defendant's motion for a new trial was overruled, but judgment notwithstanding the verdict in favor of defendant was entered, and plaintiff appealed.

Aside from the medical evidence pertaining to the nature and extent of the injury, only two witnesses testified upon the hearing, both on behalf of plaintiff. Defendant offered no evidence upon the trial. One of the witnesses, Julia Ousley, a neighbor, testified that in April 1944, the Bureau of Water Pipe Extension installed a short crosswalk extending east and west across the parkway area from the main sidewalk to the curb in front of 11306 and 11308 Champlain avenue in Chicago. After the walk was installed and a canvas placed on it, one of the workmen walked over the covering, leaving several foot impressions, two or three inches deep, in the freshly laid concrete. The walk was installed directly in front of plaintiff's home, and remained in that condition until July 31, 1944. On that day, at about five o'clock in the afternoon, plaintiff was re-

turning from the market with a bag of groceries which she carried in one arm, and her purse in the other. The store was located at 113th street and Langley avenue, which is one block east of Champlain. On her way back home plaintiff walked east along the south side of 113th street to Champlain, then south to a point opposite the walk in question. As she crossed the street toward her home she observed that the crosswalk upon which the accident occurred was submerged under one or two inches of water which had remained there after a neighbor sprinkled the grass along the walk, as he had frequently done. Plaintiff on cross-examination testified that "I knew there was water on the sidewalk before I approached the sidewalk. I knew there were those footprints on the sidewalk too. And knowing all that I proceeded to cross the curb-walk. *** I proceeded to walk through that water. It was a nice day. *** I suppose I could have gone to 11304 [next door] instead of walking through this water. I knew the sidewalk was pretty bumpy and I could pick out the place to step in. I knew that condition was there before I stepped on the sidewalk *** but I thought I would be able to pick out the even spots. *** I had forgotten where it [the hole] was at the time ***. I knew it was there some place. *** On previous occasions he [the next-door neighbor] had sprinkled in the same manner, getting the sidewalk wet. I saw that condition of the sidewalk since about April, *** when they put in the sidewalk. I saw that condition from day to day because it was right in front of my house." Plaintiff was

asked when she first noticed that the sidewalk was almost totally submerged under water, and she answered, "As I had crossed the street to go home from the store." In answer to the question, "You knew that there were these footprints on the sidewalk too?", she answered, "Yes, sir." Further cross-examination was as follows: "Q. Knowing all that, you then proceeded to cross that curb walk, didn't you? A. I did. *** Q. You could have gone on 11304? A. I suppose I could have. *** Q. But you decided to go over the sidewalk regardless of the condition of the water being on there and the footprint being on the sidewalk? A. I knew the sidewalk was pretty bumpy, and I could pick out the places to step in. Q. You knew that condition was there before you stepped on the sidewalk? A. I did. Q. So that when you started walking over that sidewalk, you knew it was pretty bumpy, and you thought you were going to pick out the even spots, is that right? A. That is right. *** Q. You say you saw that condition in the sidewalk, Mrs. Venturelli, since about April, as you recall it, that they put in that sidewalk? A. That is right. Q. And you saw that condition there from day to day, because it was right in front of your house, is that right? A. That is right." There was no occurrence witness other than plaintiff, and her testimony constitutes the entire record on the question of liability.

At the close of plaintiff's case the court said: "There is a grave, grave question in my mind but I think I am going to let you go to the jury and let them put on their defense and I will see what the jury does with the

matter and I am going to hear counsel [for defendant] on his motion [to direct]. *** I can always control the verdict. I will just take your motion under advisement and not pass on it."

The only controverted question is whether plaintiff was in the exercise of ordinary care for her own safety at the time of the happening of the accident. Whether a plaintiff has been guilty of contributory negligence is ordinarily a question of fact for the jury. However, this general rule, upon which plaintiff relies, and in support of which her counsel cite numerous Illinois cases, is subject to an exception that is well stated in Scruggs v. Baltimore & O. R. Co., 287 Ill. App. 310, as follows: "The question of whether a plaintiff has been guilty of negligence which proximately contributed to her injury, is ordinarily one of fact upon which she is entitled to have the finding of a jury; but where circumstances are such that all reasonable minds, judging honestly, must agree that she was thus negligent, and that same was a proximate contributing cause of the accident, the question then becomes one of law which the trial court is obligated to assume the responsibility of deciding. 64 Corpus Juris, p. 462, sec. 440." In Vocke v. City of Chicago, 208 Ill. 192, the court said that "If one knows of the dangerous condition of a street he must exercise reasonable care in proportion to the known danger. That fact would call for the exercise of a higher degree of care than would be required in the absence of such knowledge or where the person using the street would have a right to presume that it was reasonably safe." In the early case of

the City of Quincy v. Barker, 81 Ill. 300, it was held that "While the law requires a municipal corporation to keep its streets and sidewalks in a safe condition, and clear of all dangerous obstructions, yet a person who travels over the streets or sidewalks has no right recklessly to walk into danger, and if he does so he can not recover for an injury received. The pedestrian must exercise due and ordinary care to avoid danger, and where he fails to do so, and if it appears, had that precaution been observed, the injury could have been avoided, no recovery can be had." In the recent case of Roland v. City of Chicago (Abst.), 328 Ill. App. 320, the facts were strikingly similar to those of the case at bar. In the Roland case plaintiff had sustained injuries as the result of a fall in a depression in an alley over which she had walked for about eight months. On the ground that she did not exercise care commensurate with the known conditions which confronted her, the reviewing court reversed the judgment of the trial c urt in her favor, and held that defendant was entitled to a directed verdict. There the court quoted the pertinent rule enunciated by the Supreme Court in Illinois Central R. R. Co. v. Oswald, 338 Ill. 270, that "In the absence of willful or wanton injury on the part of the defendant the plaintiff cannot recover in an action for personal injuries unless it appears he was in the exercise of ordinary care for his safety, and in such case it is the duty of the court to direct a verdict for the defendant if there is no evidence tending to show affirmatively that the plaintiff was exercising due care or to raise a reasonable inference of such care. A party has no right

to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." In Reiter v. City of Chicago (Abst.), 303 Ill. App. 60, the court held that a careful examination of the record in that case made it clear that plaintiff was not in the exercise of due care for his own safety, and said that "According to his own testimony, he was familiar with the defects in the alley, which had been in a state of disrepair for many months, and had crossed the alley at the place where the accident occurred many times each day, and he could easily have avoided the accident by the use of reasonable care for his own safety by walking along the other side, which was perfectly safe and smooth. Even though the city may have been negligent in allowing the alley to remain in a state of disrepair for so long a time, it should still not be held liable under a clear case showing that plaintiff was not in the exercise of due care for his own safety. *** There is no evidence in this case to indicate that Reiter exercised due care for his own safety; in fact the evidence, including his own testimony, is all to the contrary. Upon this state of the record, it was the duty of the court to direct a verdict in favor of the city and its failure to do so constitutes reversible error."

We think these decisions express the prevailing rule in this state. In the most favorable light in which the testimony hereinbefore set forth may be considered, it is obvious that at the very moment plaintiff stepped into the water on the walk, she was conscious of the presence of the holes and rough spots with which she was thoroughly familiar.

Her own testimony shows that she knew there were holes in the walk, and while approaching it and before she reached it, she knew it was covered with water; nevertheless she deliberately decided that she could and would walk through the water and avoid the holes. Thus, with full knowledge that she was placing herself in a position of danger, she made her choice, and was injured. Her own testimony shows that she failed to exercise ordinary care for her own safety. It may be conceded that where there is any evidence before the jury which, taken with its reasonable inferences in its aspect most favorable to the plaintiff, tends to show the use of due care, the question is one for the jury; but whether there is any such evidence is a question of law. Dee v. City of Peru, 343 Ill. 36. We think that in the case at bar all reasonable minds would agree that the proximate cause of the accident resulted from plaintiff's own negligence, and under the circumstances it became the duty of the court to hold as a matter of law, upon her testimony, that she was contributorily negligent. Accordingly, the judgment should be affirmed, and it is so ordered.

Judgment affirmed.

Sullivan, P. J., and Scanlan, J., concur.

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3 37 I.A. 284

GEORGE E. MATHIS and WILLIAM MATHIS, Co-partners, doing business as GEORGE E. MATHIS & SON, Appellants,	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	)	
CITY OF CHICAGO, a Municipal Corporation, Appellee.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover, upon a quantum meruit, the reasonable value of the work and labor performed and material furnished by them to defendant under a written contract between the parties known as M-3, dated October 24, 1941, for the furnishing and installation of ventilating equipment for the State Street and Dearborn Street subways in Chicago. The complaint consists of two causes of action, in the first of which plaintiffs sought to recover the fair, reasonable and market value of all labor and materials furnished, and in the second they asked for damages for breach of contract by the defendant. In the course of the trial, plaintiffs elected to stand on the first cause of action, and thereupon they withdrew the second cause of action, and all evidence relating thereto was stricken from the record. At the close of plaintiffs' case, upon motion of the defendant, the court found in favor of the defendant, and entered judgment accordingly. Plaintiffs have taken an appeal.

Two voluminous printed documents constitute the contract between the parties: one is described as "Contract Requirements and Contract Plans for Ventilation Equipment, Contract M-3, for the State Street and Dearborn Street Subways, issued by City of Chicago, Department of Subways and Superhighways, August, 1941"; the other document is entitled

"Standard Specifications for Subway Construction, General Conditions-Section I, General Conditions-Section II, issued by City of Chicago, Department of Subways, February, 1940." Both of these documents were received in evidence, and together with the testimony adduced upon the hearing and various letters that passed between the parties, constitute the record in the case.

Plaintiffs as contractors agreed to perform the work required under contract M-3 which included furnishing and installing ventilating fans, electrically operated louvers, miscellaneous steel and temperature-recording instruments for the State Street and Dearborn Street subways. They were required by written notice of the defendant on November 7, 1941 to commence work not later than on November 12, 1941. On November 30, 1942, after the work had been in progress for approximately one year, defendant notified plaintiffs in writing (plaintiffs' exhibit 7) to discontinue certain aspects of the work in the Dearborn Street subway. Inasmuch as the construction of exhibit 7 constitutes one of the principal controversies at issue, we set out the pertinent portion thereof as follows: "You are hereby instructed not to erect any louver operators in the Dearborn Street Subway at this time, as we feel that if these units, which consist of a gear transmission in a cast iron case with a fractional horse power motor, were installed now, they would deteriorate, as they might stand for a year or two without being operated. We will advise you at some future date, when the operators are to be installed. This does not apply to the louvers themselves, which you will erect as soon as possible. You

will, therefore, deliver the Dearborn Street louver operators and operating mechanisms, such as cranks, forks and pipe linkage, to our warehouse after we have made an inspection of same at your plant in Chicago. You will install the louvers themselves, complete with frames, shafts and bearings in the Dearborn Street Subway, at this time. *** In your reply, please state whether this arrangement meets with your approval. The cost of storing the Dearborn Street operators will be paid for by the City of Chicago."

December 8, 1942 plaintiffs replied to this communication as follows: "In answer to your letter of November 30, 1942, it is our understanding that the Dearborn Street Subway may stand idle for a year or two, therefore tying up the balance of our contract. We feel some arrangement should be made to take care of the balance of reserve involved, plus any cost to us incurred by postponement of the Dearborn Street Subway."

Subsequently, on March 5, 1943, plaintiffs again sent a letter to Charles E. De Leuw, acting chief engineer, department of subways, as follows: "We are advised that after the completion of a certain portion of our work upon the Dearborn Street Subway, no further material is to be furnished nor labor performed upon this subway. *** By this decision on your part we are confronted with a number of problems. ***" These problems, pertaining to ventilating fans, electrically operated louvers, miscellaneous steel and temperature-recording instruments, were treated in detail, and plaintiffs concluded their letter by saying that "in view of the uncertainty as to when the Dearborn Street Subway is to be completed, due

to the fact that we are informed that the postponement is indefinite, we believe that we are entitled to be advised as to your attitude with respect to each of the matters set forth ***. Will you please let us hear from you in due course."

In its letter of May 19, 1943, defendant sent the following reply: "Your letters dated December 8, 1942 and March 5, 1943, referred to the delay in the completion of your work on the Dearborn Street Subway and requested advice as to our plans for the continuation of this work. As you know, this situation has arisen because of restrictions imposed by the War Production Board in the procurement of critical materials. However, it is our desire to complete all of the work under your contract at the earliest possible moment. Article 15—Unavoidable Delays—General Conditions—Section II of Standard Specifications for Subway Construction, provides: 'Should the contractor be obstructed or delayed in the commencement, prosecution or completion of the work under the contract by any act or delay of the City, including any delay due to not acquiring necessary right-of-way within the limits of the work specified *** war *** then the times fixed for the completion of the work to the extent specified shall be extended for a period equivalent to the time lost by reason of any of the aforesaid causes mentioned in this article. No such allowance of time shall be made, however, unless notice in writing of a claim therefor is presented to the Commissioner before the last day of each succeeding calendar month ***.' Because of the unpredictable extent of the period which you may be delayed in completing the work under this contract,

it is not deemed necessary that the specified claim be filed by you each month, but it is essential that you file an initial claim requesting an extension of time in which to complete the work. Such action on your part is prerequisite to our clearing for payment such items mentioned in your letter which may be classified as delay damages under the terms of the contract."

July 7, 1943 plaintiffs addressed the following communication to defendant: "We acknowledge receipt of your letter of May 19, 1943. By reason of your decision to delay to an indefinite time in the future the completion of the work on the Dearborn Street Subway and in accordance with Article 15, Unavoidable Delay, General Conditions, Section 2 of Standard Specifications for Subway Construction, we give you this notice, in writing, of our claim." The letter then sets forth in considerable detail the nature of plaintiffs' claim, and concluded by saying that "when the City determines to renew the construction of the Dearborn Street Subway, we should be paid for all of the items as provided in Article 15 of the General Conditions as well as a percentage for overhead and profit on such additional work due to such delay."

On July 16, 1943 defendant wrote plaintiffs as follows: "From the content of your letter of July 7, 1943 *** it appears that we are not in substantial agreement on a number of the items in question. In order to work this matter out to a satisfactory conclusion, it appears necessary that we hold another conference for the purpose of adjusting those items on which we are not in agreement. Please

advise when you will be willing to attend such a conference."

At the conference, held July 21, 1943, the parties failed to reach an accord, as evidenced by plaintiffs' letter of August 4, 1943 which they concluded by saying: "We have carefully and exhaustively considered the situation and have come to the conclusion that we must insist upon our claims as outlined in our letter to you of July 7, 1943."

On October 1, 1943 plaintiffs proposed in writing "the following as a disposition of our controversy with the City respecting our contract: 1. A reasonable extension of time to complete our contract, which we now request in accordance with provisions of Article 15—General Conditions—Section II—Standard Specifications for Subway Construction, where, as at present, we have been unavoidably delayed by the act of the City. 2. The City is to release to us, within a reasonable time, the sum of $16,699.47, being the balance due us on the portion of the contract known as the State Street Subway. 3. The City is to reimburse us for all storage and insurance costs on material stored by us at your request in the warehouse designated by you until the City takes over the storage and insurance of such material. 4. All maintenance work on all material or equipment furnished by us, and which work may be ordered by your department, shall be paid on the basis of cost plus fifteen percent. 5. Nothing herein contained shall constitute or be considered a waiver of any claim which we may now have on account of the City's delay in the construction of the subways."

Thereafter the following occurred: (1) the time to

complete the contract was extended because of conditions resulting from the war; (2) on December 1, 1943 the city council (C.J. p. 902) passed an order authorizing the commissioner to pay the contractors $16,700.00, and that sum was paid to them; (3) that council order also authorized the commissioner to pay the contractors $200.00 to cover their cost of insurance and storage of equipment, and that sum was paid to the contractors; (4) the commissioner agreed to pay the contractors for maintenance work on all materials and equipment furnished by the contractors and ordered by the department on the basis of cost plus fifteen per cent; and (5) the contractors reserved the right on completion of their work to present any claim they thought proper for extra compenation on account of unavoidable delays based on the provisions of article 15 of S.S.S.C.

On June 1, 1945 plaintiffs rescinded their contract with the city in writing as follows: "You are hereby notified that we have elected to rescind our contract with the City of Chicago, dated October 24, 1941, for the furnishing and installation of ventilation equipment for the State Street and Dearborn Street subways, known as Contract M-3, for the reason that the City of Chicago has unreasonably delayed us in the performance of our said contract for a period of more than two years, whereby we have sustained and are continuing to sustain great loss, damage and injury."

Three days later, on June 4, 1945, Philip Harrington, commissioner of subways, addressed the following reply to the letter of rescission: "This will acknowledge receipt of your letter of June 1, 1945, expressing your desire to

rescind your contract with the City of Chicago dated October 24, 1941, for the furnishing and installation of ventilation equipment for the State Street and Dearborn Street Subways, known as Contract M-3. We are forwarding your letter to the Corporation Counsel of the City of Chicago for a legal opinion in this matter." Harrington, further replying, on June 18, 1945, sent plaintiffs a copy of an opinion from the corporation counsel wherein he reviewed the salient provisions of the agreement, the correspondence between the parties and the events that followed, and reached the conclusion that plaintiffs did not have the right to rescind the contract, and added that if they insisted on so doing, "they should be advised that the City will regard this stand as an anticipatory breach *** and hold the Contractor and their Surety on the performance bond responsible for any damage resulting therefrom."

The total amount of all labor and materials furnished by plaintiffs, plus profit, was $178,265.13, of which sum there had been paid to them $143,122.65. They seek to recover upon a quantum meruit the sum of $35,142.48, with interest at the legal rate from the time the monies allegedly became due and payable.

Plaintiffs now construe the letter of November 30, 1942 (plaintiffs' exhibit 7) as a directive to discontinue the performance of the contract as to the Dearborn street subway until some indefinite time in the future. They say that such delay was not contemplated by the parties and that no specific provision was made for delay of such an extent; that by directing plaintiffs to stop work in the Dearborn

street subway defendant breached the contract, and when the delay continued for a period of more than two years, plaintiffs had the right to rescind and to sue for and recover as upon a quantum meruit the fair, reasonable and market value of all labor and materials furnished, less amounts received by them from defendant. However, this construction is at variance with that which they gave it at the time the letter was written and received by them. They were then principally concerned with losses incident to the delay, for which they wished to interpose a claim against the city. The city has never taken the position that such claims would not be allowable if the contract had not been completed, but it took the position that no allowances should be made unless notice in writing for an extension of the contract was presented in accordance with its terms; and in lieu of the provision that a specified claim should be filed by plaintiffs each month, the city suggested in its letter of May 19, 1943 that it did not consider it necessary to follow this procedure but that it was essential "that you file an initial claim requesting an extension of time in which to complete the work. Such action on your part is prerequisite to our clearing for payment such items mentioned in your letter which may be classified as delay damages under the terms of the contract." Plaintiffs evidently acceded to this suggestion and request, although reluctantly, because on October 1, 1943 in their proposal "as a disposition of our controversy" they ask for a reasonable extension of time to complete their contract, for the release by the city of some $16,000.00 balance due them on the portion of the contract known as the State Street

Subway, for reimbursement of all storage and insurance costs on materials stored at the request of the city and for payment on the basis of cost plus 15 per cent of all maintenance work on material or equipment furnished by plaintiffs. It is significant that after this proposal was made to the city, substantially all their suggestions were complied with by council order or authorization of the subway commissioner.

Upon the facts related, the city takes the position that plaintiffs did not have the right to rescind the contract because the delay in the performance of the contract was due to the inability of the parties to obtain necessary priorities of a classification sufficient to obtain critical materials; that defendant did not direct plaintiffs to stop all work; that the time for the construction of the work was extended by agreement of the parties; that plaintiffs' proposals for the extension of the contract upon their own conditions were accepted; that after the time for performance was extended, plaintiffs failed to make any offer of performance or demand that they be permitted to perform before giving notice of the rescission; and that as a matter of fact plaintiffs were working continuously on the subway from November 30, 1942 to June 9, 1944, indicating that they did not at any time consider the letter of November 30, 1942 as a stop order which would justify a rescission for breach on the part of defendant.

When the contract was entered into, the parties undoubtedly anticipated some delay due to the shortage of critical materials then being used for national-defense needs. Accordingly they inserted in section 13a of the con-

tract the following provision: "The Office of Production Management, Division of Priorities of the United States of America, has assigned preference rating B-1 to deliveries of material which will directly or indirectly, at any stage, enter into the construction by the City of the Initial System of subways, P.W.A. Project Ill. 1891-F. This preference rating is intended to be used only when the Contractor, with the exercise of due diligence, is unable to secure any material, when required by this contract, without the use of such preference rating. The Contractor agrees that if any material cannot be secured, when required, without the use of such preference rating, that he will use such preference rating and that he will be bound and carry out the requirements set forth in the preference rating order, a signed copy of which the City will furnish to the Contractor if the Engineer shall have been satisfied that the use of such preference rating is necessary in order to carry out the requirements of this contract; all without limiting the provisions of Section 13 of the General Specifications." Under this provision it was plaintiffs' first duty to attempt to obtain the necessary material on the open market before using a request for a priority. Plaintiffs admit that applications were made by them on suitable forms for priorities from time to time, and plaintiff William Mathis testified that "every request that I made out for priority was in connection with an authority. I could not have gotten the material without a priority." After December 1941 critical materials became more scarce, and it appears that plaintiffs could not get all the fans required under the contract. They obtained

motors from Westinghouse Electric Company for the State street subway, but could not get them for the Dearborn street installation. Twenty-two ventilating fans that were to be installed in the Dearborn street subway could not be obtained, nor 22 sets of electrical controllers. The lack of these items alone would have made it impossible for them to perform their contract by reason of governmental restrictions. The trial judge, in his oral opinion at the conclusion of the hearing, found that "these delays which resulted in this case, arose out of the inability to get priorities," and that "there is no evidence in the case that the City was derelict in any way in its duties in applying for priorities when requested by the contractor ***. Therefore, the Court finds as a fact that the delays have been due to inability to get priorities, that there is no evidence that the City failed in its duty in attempting to get priorities and the Court holds, as a matter of law that the provisions of Article 15 of Plaintiffs' Exhibit 2 applied and that the contract was merely suspended during the period when materials were not available and the plaintiffs had no right to rescind."

It is plaintiffs' contention that articles 14 and 15 of the contract which provide for extensions of time, when read in connection with other sections, indicate that the delay or suspension of the program of the work within the limitation of the 365-day period, could be only upon written order of the commissioner stipulating the period of time of such delay, and they say that defendant never had any right to delay or suspend the work for any uncertain or

indefinite period of time. In view of the court's findings, which we think are sustained by the evidence, this contention is untenable. In their complaint plaintiffs alleged that the "delay was caused by defendant failing to supply plaintiffs with high enough priorities." The burden of proof rested upon them to sustain this allegation, and the court found, and we think properly so, that they failed to prove any fault on the part of the city in this regard.

Aside from the foregoing considerations relating to delay caused by the shortage of critical material and to the construction of defendant's letter of November 30, 1942 as a stop order, more than 18 months after it was written, and then for the first time used as ground for rescission of the contract, we think that the offer of the proposals by the contractors for disposition of the controversy and the acceptance of the offer by the city evidenced by its compliance with the various demands made, constituted an agreement between the parties which bound both of them to keep the contract alive until alleviation of the conditions caused by the war would permit the contractors to resume operations. The court will take judicial notice of the fact that all civilian activities during this period were forced to abide the war effort, and in consequence delays were experienced in the performance of public and private contracts generally. It is not denied that on completion of the work the contractors would have had the right to present a claim for extra compensation, as specified under various sections of the contract, but instead of abiding their time plaintiffs insisted upon terminating their agreement without

the consent of the city, notwithstanding the testimony of William Mathis that "we were working continuously from November 30, 1942, to June 1944." In the light of the communications that passed between the parties and the conduct of plaintiffs, they were not justified in rescinding the agreement without first making an offer or demand to be permitted to further perform the contract. It has been held that delays in performance of a contract may be waived by conduct indicating an intention to regard the contract as still alive. Schmahl v. Aurora National Bank, 311 Ill. App. 228; Watson v. White, 152 Ill. 364. That there was such an intention on the part of plaintiffs is clearly evidenced by the circumstances hereinbefore set forth. It has also been held that after delays in performance have been waived a contract cannot be rescinded for failure strictly to perform without giving notice and a reasonable opportunity to perform. Plummer v. Worthington, 321 Ill. 450. No such notice was given by plaintiffs, nor did they in any way indicate that they desired a reasonable opportunity to perform prior to the rescission of the contract. We think this is an additional reason why they cannot recover.

In view of these conclusions, other questions raised need not be discussed. We are of opinion that the trial court properly resolved the issues in favor of defendant. Accordingly the judgment should be affirmed, and it is so ordered.

Judgment affirmed.

Sullivan, P. J., and Scanlan, J., concur.

44665

HARRY J. GRAFF, Appellant,	)	337 I.A. 285
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
ARLINGTON SEATING COMPANY, a corporation, et al., Appellees.	)	

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order sustaining a motion to dismiss the amended complaint. The complaint is in three counts.

The first count charges, inter alia, that plaintiff was a person of good repute, employed by defendant company, and faithfully and fully performed his duties as an employee, and earned approximately $52.39 per week; that he endeavored to organize the employees into a labor union, and collected 43 membership cards for the formation of said union; that defendant company by its officers and superintendent, Carl Ebitsch, opposed his efforts to organize, and conspired with defendant Rezner, and all of them participated in the unlawful scheme and conspiracy to maliciously injure the plaintiff and destroy his reputation; that in the presence of other persons and employees, during the hours of employment, they falsely accused plaintiff of an infamous crime by charging him with having stolen $30 out of the locker of defendant Rezner; that defendant company, by its officers and superintendent, aided and abetted Rezner in said charges and did ratify said charge and refused to investigate the truth or falsity thereof,

though repeatedly requested to do so by plaintiff, and summarily discharged plaintiff, pretending to believe the charge, which was wholly false, as defendants well knew, and was a part of their scheme and conspiracy to make an example of plaintiff for his part in helping form such union.

Count II adopted paragraphs 1 to 6 inclusive of Count I, and claimed the balance of a week's pay - namely, $32.53 - for the remainder of the week in which he was discharged, and a week's pay for failure to give him a week's notice, a total of $84.92.

Count III similarly adopted paragraphs 1 to 6 inclusive of Count I, and alleged that on February 25, 1948, at about 4:15 P. M., plaintiff finished picketing, entered his own automobile preparatory to driving home, when defendant Johnson drove up in the police car and arrested plaintiff, advising him it was for drunkenness and disorderly conduct, which was absolutely false and merely a part of the intimidation and coercion being practiced against plaintiff to discourage him from further picketing; that no summons or warrant was served on plaintiff at the time of his arrest; that after he was locked in a cell for some hours, Johnson made out a ticket, which he passed through the bars to plaintiff, and refused to release him without plaintiff paying $28; that later defendant Neumann, a police magistrate, appeared and demanded $28, which plaintiff did not pay, but was released later, after talking with a lawyer; that defendant company, by its officers and superintendent, not only caused said arrest but appeared before the police magistrate; that defendant Ebitsch was

present in person and intimidated some of plaintiff's witnesses; that defendant Neumann interfered with one of the witnesses who had been subpoenaed and threatened him so that he was afraid to appear; wherefore defendants are all maliciously carrying on said prosecution and persecution on said fictitious charges of drunkenness and disorderly conduct.

Stripped of its unnecessary verbiage, we believe Count I substantially states a cause of action for slander. If proven, the words spoken are actionable per se. Bradley v. Bakke, 306 Ill. App. 569. In Monroe College of Optometry v. Goodman, et al., 332 Ill. App. 78, the complaint charged a conspiracy against the several defendants to libel and damage the plaintiff in the conduct of its school. The trial court dismissed the complaint for insufficiency, and this court, Second Division, speaking through Mr. Justice Scanlan, said at page 90:

> "The complaint, even if tested by the ancient technical rules of common law pleadings, would not, in our judgment, be vulnerable to a motion to strike, but the question before us is to be determined in the light of the provisions of the Civil Practice Act. In People ex rel. Wilmette State Bank v. Village of Wilmette, 294 Ill. App. 362, Mr. Justice O'Connor said (p. 368):
>
> "'The purpose of the entire act [Civil Practice Act] was to simplify the procedure and the prime object of the act was to enable the parties to a cause to have the merits of their controversies passed upon by the courts---the realities considered rather than that the matter be decided on mere technicalities which often justly bring the courts into disrepute.'"

The conspiracy charge, if proven, would make those charged in the count liable for the slander. Monroe College v. Goodman. The court erred in dismissing said count.

Count II, in our judgment, wholly fails to set up any

cause of action. There are no facts alleged in that count which would entitle plaintiff either to recover the balance of the week's pay or an additional week's pay for failure to give him a week's notice, since no contractual obligation is shown, either express or implied. There can be no recovery for it, and the conspiracy alleged in the first six paragraphs of the first count can have no relation whatever to the recovery sought under Count II.

Count III is directed against defendants Johnson and Neumann, who are not included in the conspiracy charged in paragraphs 1 to 6 inclusive in Count I. The essence of Count III is to charge these two defendants with malicious prosecution. There are several reasons why this count does not state a cause of action. There is no allegation that the criminal prosecution had terminated at the time of the filing of the complaint, and that it had terminated favorably to plaintiff. Shedd v. Patterson, 302 Ill. 355; Shelton v. Barry, 328 Ill. App. 497. It is not necessary to discuss other objections made to this count.

Plaintiff argues that the motion to dismiss was not verified, as required by Section 35 of the Practice Act (ch. 110, par. 159, Ill. Rev. Stat. 1947) pertaining to verification of pleadings. There is no merit to this contention, since Section 32 of the Practice Act designates the pleadings in a cause, and does not include motions to strike. On the other hand, Section 45 of the Practice Act provides that motions may be used in place of demurrers to point out objections to pleadings. There is no requirement in Section 45 that such motions be verified.

For the reasons indicated the order of the Superior Court is reversed as to Count I of the amended complaint, affirmed as to Counts II and III, and remanded with directions to overrule the motion to dismiss Count I.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

Tuohy and Niemeyer, JJ., concur.

44707

R. L. FELTINTON, Appellee, v. JOHN J. RUDNIK, FRANCES RUDNIK, ROSE M. FARROW and YOLANDA RUDNIK, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is by defendants from a decree directing a sale of real estate to satisfy a judgment against John J. Rudnik and Frances Rudnik, entered in the Municipal Court of Chicago on June 13, 1941, in the sum of $5,616 and costs. On June 18, 1941, an execution was issued on said judgment, a demand made upon the judgment debtors on July 9, 1941, and the execution returned nulla bona September 17, 1941.

Plaintiff became the assignee of record of the judgment in question, and filed the creditor's bill to subject the real estate to the payment of the judgment, charging there had been a transfer by the judgment debtors in fraud of his rights as creditor. Answers by defendants were filed to the complaint, and the cause referred to a master to report his conclusions of fact and law. The master, after hearing the evidence, made his findings of fact and recommended that the judgment be declared a lien upon the real estate, and that the same be sold to satisfy the judgment. Exceptions to the master's report were overruled, and a decree was entered in accordance with the master's report. The decree directed the payment of the

judgment within 20 days from its entry, in default of which the master was directed to make sale of said real estate. A direct appeal was taken to the Supreme Court (401 Ill. 362), upon the theory that a freehold was involved. The Supreme Court, holding that a freehold was not involved, transferred the cause to this court.

The assignment dated August 26, 1946, of the interest of the judgment debtors in the real estate in question is to two of their daughters, Rose Farrow and Yolanda Rudnik. It appears without dispute in the evidence that Mary Ochadlowski, a sister of the judgment debtor Frances Rudnik, formerly owned the property in question at 1623 Leland Avenue, which went to foreclosure and title acquired by the National Life Insurance Company. It is the claim of the judgment debtors that at the suggestion of Mary Ochadlowski a family conference was called by her; that in this conference, it was agreed that the daughters and Mary Ochadlowski would advance the money to repurchase the property from the insurance company, and allow the judgment debtors, in their declining years, to make their home in said property; that a contract with the insurance company was signed by John J. Rudnik and Frances Rudnik, on October 24, 1938, in which they agreed to purchase it as joint tenants and pay the sum of $23,000 in monthly installments, with an initial payment of $1,000 at the time of the signing of the contract, and that the daughters and sister advanced the money. The contract was to be delivered by the insurance company when an additional $1,500 was paid. A check of Frances Rudnik for $1,000 was given as the initial payment upon the contract of purchase. It appears that in August, 1946, Frances Rudnik, the

judgment debtor, through a real estate broker, arranged for a loan of $14,000 with which to pay off the balance of the purchase price due the insurance company. The loan was approved, and the note, dated September 21, 1946, for $14,000 secured by a trust deed upon the real estate, was signed by Rose Farrow, the daughter, and her husband, Yolanda Rudnik, and the judgment debtors, John Rudnik and Frances Rudnik. A warranty deed was secured from the insurance company, dated September 21, 1946, to Rose Farrow and Yolanda Rudnik in joint tenancy. The trust deed to secure the note in question was signed by Rose Farrow and her husband, and Yolanda Rudnik, a spinster.

The master in his findings of fact pointed out in detail the contradictions in the testimony of the witnesses for defendants, and particularly with reference to Mary Ochadlowski, who claimed to have contributed, according to the agreement reached at the family conference, $1,000 in cash, and who testified that she kept it in a secret hiding place and turned it over to Yolanda Rudnik. She at first testified she had no bank account and kept her money at home, but when confronted with the fact, she finally admitted she then had a bank account at the First National Bank of Chicago. She took no written evidence of the advance or loan made by her, and no time was set for repayment, nor was there any discussion of it ever had.

The further significant fact, pointed out by the master, was the initial payment made upon the contract to purchase, by check of Frances Rudnik on an account maintained by her. No explanation appears for the fact that both judgment debtors signed the note for $14,000, secured by

the trust deed on the property. If, as the defendants claim, the judgment debtors entered into the contract of purchase of the real estate for the daughters, and that is why the title to the property was taken by warranty deed from the insurance company in the names of Rose Farrow and Yolanda Rudnik and not the judgment debtors, then there seems to be no plausible reason given why the judgment debtors should have been required to sign the trust deed note and make themselves liable. The reasonable inference is that the judgment debtors had some interest in the real estate.

It appears also that the property was registered in the office of the Federal Price Administrator, having charge of rent regulations, in which statement of registration the names of the tenants of the building in question were listed, and the name of the landlord given as John and Frances Rudnik. The statement of registration so filed was signed by Frances Rudnik as landlord. It also appears that on August 10, 1945, a letter signed by Rose Farrow and Frances Rudnik was written to one of the tenants in said building, notifying him that Mrs. Frances Rudnik proposed to occupy his apartment; that she was one of the owners of the building, having purchased the property prior to October 20, 1942, and requesting the tenant to vacate the apartment as of September 30, 1945, so that the owner might have possession. A copy of this notice was filed in the office of the Federal Price Administrator. While the registration, notice and the letter to the tenant, referred to, are not in themselves conclusive evidence of the alleged ownership of the real estate or an interest therein in the judgment debtors, yet when considered with all the other

facts, the master was convinced, and the chancellor also, that the transfer by the judgment debtors of their interest in the real estate, evidenced by the contract of purchase, was in fraud of the rights of plaintiff, and entitled him to a lien of the judgment upon the real estate and a sale to satisfy said lien.

There is considerable discussion in the briefs of both parties as to whether the judgment debtors were holding the property in trust for the other defendants, and whether such trust is an implied, resulting, or express one. We regard all of this discussion as wholly out of place. Such a discussion may be applicable in a controversy between the judgment debtors and the other defendants but not as to plaintiff. The only question between them and the plaintiff is whether the transfer was a bona fide transfer for a valuable consideration, or whether the transfer was without a valid consideration and therefore in fraud of his rights. The doctrine is clearly stated in DeMartini v. DeMartini, 385 Ill. 128, and quoted with approval by the Supreme Court in the instant case on the direct appeal (401 Ill. 362):

> "Secondly, it is well established that a transfer of property fraudulent and void as to creditors is nevertheless valid as between the parties thereto. (Illinois Trust Co. v. Jones, 351 Ill. 498; Rosenbaum v. Huebner, 277 Ill. 360.) A conveyance of this sort is void only as against creditors, and then only to the extent to which it may be necessary to deal with the conveyed estate for their satisfaction. To this extent and to this only, it is treated as if it had not been made. To every other purpose it is good. Satisfy the creditors, and the conveyance stands."

When a transfer of the type here in question is made by a judgment debtor, after judgment and execution returned

nulla bona, and the transaction is called into question, it becomes highly important that the judgment debtors and those interested in sustaining the transfer testify to circumstances attending the transaction that convince the reasonable mind of the bona fides of the transaction. When their testimony, in the light of the documentary evidence is so clearly unbelievable as to completely discredit them as witnesses, then the master and the chancellor were justified in reaching the conclusion, upon this record, that the transfer was a preconceived plan by the members of the family to defeat the rights of creditors.

The master heard and saw the witnesses and was in a better position to judge of their credibility. His findings are entitled to due weight. Pasedach v. Auw, 364 Ill. 491; Zarembski v. Zarembski, 382 Ill. 622, 632. While they are not binding upon the chancellor or this court, we are convinced that the findings of the master and the decree of the court are amply justified by the evidence. Accordingly, the decree of the Circuit Court is affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.

44720

WILLIAM E. MOSBY, Appellee, v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered by default in an action upon two policies of life insurance to recover disability income, with interest, claimed to be due from May 10, 1946, to the date of suit, September 17, 1947.

Plaintiff's original complaint was, on motion of defendant, stricken for failure to allege a cause of action. An amended complaint filed, alleged that plaintiff had kept, performed and observed all conditions precedent on his part to be kept, performed and observed, embodied in the policies of insurance in question. The answer to the amended complaint denied this latter allegation, and alleged that plaintiff had attained the age of 60 years on February 5, 1947, and furnished no proofs for claims of disability under either policy until June 13, 1947. An amendment to the amended complaint was filed, in which it was alleged plaintiff, before attaining the age of 60 years, became wholly, permanently and totally disabled; that he was stricken by a cerebral hemorrhage on May 10, 1946, and was confined thereby to the Jackson Park Hospital for a period of three weeks; that he was returned to his home and confined to bed during the summer of 1946 and most of the winter; that he became 60 years of age on February 5, 1947, and was totally incapacitated

from performing any work for compensation from May 10, 1946, onward; that he did not know until on or about the first day of June, 1947, that his condition would permanently and totally disable him and prevent him from performing any work for compensation, gain or profit; and that on or about the first day of June, 1947, it became manifest to both plaintiff and his medical advisor that his condition was such that he was permanently and totally disabled.

Plaintiff attached copies of the policies as exhibits to his amended complaint. Defendant moved to strike the complaint as thus amended, which motion was denied. Defendant electing to stand by its motion, judgment followed by default.

The relevant provisions of the policies are:

> "If the Insured, after payment of premiums for at least one full year, shall, <u>before attaining the age of sixty years</u> and provided all past due premiums have been duly paid and this Policy is in full force and effect, <u>furnish due proof to the Company at its Home Office</u> either (a) that he has become totally and permanently disabled by bodily injury or disease, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation, * * *." (Italics ours.)

The rider attached to the policies provides the following:

> "If, while no premium is in default, the proof furnished the Company under the section providing for 'Benefits in Event of Total and Permanent Disability before Age 60' is such as to entitle the Insured to the Disability Benefits provided for therein, and if due proof is also furnished the Company that such disability has been continuous since its beginning, the Company will;
>
> "(a) Begin the monthly income payments provided for in such section as of the end of the first completed month of such disability if earlier than

> the date of receipt of such proof instead of as of the date of receipt of such proof, and,
>
> "(b) Return any premium due after the beginning of such disability which has been paid during the continuance thereof."

Defendant contends that the provision in the policies for furnishing proofs of disability to the company before the insured reaches the age of 60 is a condition precedent to his right to recover. Plaintiff counters with the theory that the rider, properly construed, indicates clearly the provision with respect to furnishing proof of disability before the age of 60 is not a condition precedent. It is clear from the pleadings that the proofs of disability were not furnished until after the insured reached the age of 60 years. Similar provisions in the policies and the rider were before this court in Moscov v. Mutual Life Ins. Co., 320 Ill. App. 281, affirmed 387 Ill. 378. We there said at page 284:

> "And counsel says that if the policy did not have printed on the back the rider or 'Supplementary Benefits' above quoted, the furnishing of proof of disability by the insured before he reached the age of 60 would be a condition precedent. This is a correct construction of the policy, Jabara v. Equitable Life Assur. Soc., 280 Ill. App. 147. But counsel says that this provision of Section 3 requiring the giving of notice as a condition precedent was eliminated by the rider. We are unable to agree with this contention. ****
>
> "We think that the rider did not eliminate the provision of the policy requiring that proof of disability be made before the insured was 60. The language of the policy in this respect is unambigous and therefore must be construed as any other contract."

In the Moscov case the mental incapacity of the insured was alleged as an excuse for failure to furnish

proof of disability before the age limit, and we concluded that it did not avoid the requirement of compliance with the condition precedent. In the instant case, plaintiff sought to avoid the effect of the condition precedent by alleging that the illness in question started before he reached the age of 60 years, but he did not know of the permanent disability until after he had reached the age of 60 and, therefore, could not furnish proof of permanent disability until after the age limit. We regard the Moscov holding as against this contention.

Upon the facts alleged, plaintiff cannot recover, and the court erred in entering judgment against defendant. Accordingly, the judgment of the Circuit Court is reversed.

REVERSED.

Tuohy and Niemeyer, JJ., concur.

44602

DANIEL LERMAN, Appellee,	)	
v.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
UNIQUE CLEANERS, Appellant.	)	

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of $3,500 entered against it in an action for injuries sustained as the result of an explosion in defendant's plant.

Defendant is engaged in the cleaning and dyeing business in connection with which it operates a steam boiler heated by an oil burner. About a month prior to the explosion the boiler was installed by defendant, and the Enterprise Heat and Power Company (hereafter called Enterprise) installed the oil burner. This equipment operated successfully. Just before the explosion the defendant installed a "low fire start motor," which was attached to the oil burner for the purpose of reducing or slowing the flow of oil when the larger motor operating the oil burner was first turned on. Plaintiff, an electrician who had done the electrical work in connection with the installation of equipment furnished by Enterprise for a number of years and had done the electrical work in connection with the oil burner installed in defendant's plant and had also done other electrical work for defendant, made the electrical connections necessary for the operation of the low fire start motor. After making these connections, which required only a few

minutes work, the large switch operating the oil burner was turned on and the low fire start motor functioned properly. Plaintiff, noticing the absence of the noise which usually accompanied the operation of the oil burner, looked into the boiler through a peephole and saw a sort of a gray cloudy stuff, and before he could move away the explosion came, injuring him and the engineer employed by defendant. There is no claim that the damages awarded are excessive.

The complaint charged that the defendant (a) negligently maintained the oil burner; (b) negligently failed to clean certain igniters on the oil burner, and (c) "negligently permitted plaintiff to be and remain in a position of danger without notice to him with knowledge on the part of defendant that said oil burner might explode if not properly maintained." At the close of plaintiff's evidence charge (b) was withdrawn. The jury answered "Yes" to the special interrogatory "Did the defendant negligently maintain said oil burner?" and "No" to the interrogatory embodying charge (c). Defendant contends that there is no evidence supporting the claim of alleged negligent maintenance of the oil burner. The representative of Enterprise who inspected the oil burner several days before the explosion was subpoenaed by both parties and testified on behalf of plaintiff. He stated that the boiler was not part of the oil burner unit; that this unit was in good shape and was being properly maintained when he made his inspection several days before the explosion; that the oil burner was installed in front of the boiler; that he was called to the plant the morning following the explosion; that nothing was damaged on the oil burner; that the boiler flue doors at the front

were blown open and the breeching was blown off; that there was a metal damper through the stack operated by a handle which functioned like a damper in a stovepipe; that he tested the oil burner by starting it and that it worked satisfactorily; he had "nothing to do with the breeching, the boiler or any of that work that was damaged by the explosion"; the breeching is the exhaust pipe of galvanized iron about 40 inches square coming off the top at the front of the boiler and extending to the big stack about 20 feet away, carrying the gases to the outside. In answer to a hypothetical question as to whether there might or could be any causal connection between the explosion "and the condition or maintenance of this oil burner and boiler and flue and other equipment that is all part of that heating apparatus," he answered that there was no connection in the hooking up of this unit (low fire start motor) or of the oil burner and boiler itself; that the stack must have been closed or something like that, that caused the gases to accumulate in the boiler to cause the terrific explosion; that "the looks of the boiler and condition of the equipment over there--showed that the boiler had gas up in the flue cap or in the discharge part of the boiler, and that is where the fire backed up from, because it could not go any place else. Now what obstruction was there, I could not tell that the day after"; that "There is only one thing that would cause a burner to back up or fire back under that type, is an explosion in the stack. That would mean definitely that a damper was closed."

Defendant's engineer testified that the damper in the stack was open continuously from the time the boiler

was put in operation; that he had suspended a weight on a chain attached to the handle of the damper to keep the damper open. Defendant's maintenance man, who arrived at the plant about four hours after the explosion, testified that the damper was open. On cross-examination the expert testified to six causes, other than the closed damper, that might or could possibly cause the explosion. These need not be enumerated. At the close of all the evidence defendant moved for a directed verdict, and after return of the verdict made a motion for judgment notwithstanding the verdict and for a new trial, and to set aside the special finding of the jury as to the negligent maintenance of the oil burner.

Defendant contends there is no evidence that the oil burner was negligently maintained, that the boiler, flue and damper were part of the oil burner, or that the explosion was caused by any negligence of defendant in respect to the oil burner. Objection is also made to the admission of certain testimony, to conduct of plaintiff's counsel, and to the giving and refusing of instructions. It is not necessary that we consider these objections. The case is before us on the charge that defendant negligently maintained the oil burner. The second charge of negligence was withdrawn at the close of plaintiff's evidence, and the jury, in answer to a special interrogatory, found against plaintiff as to the third charge, and no motion to set aside this finding was made by plaintiff. Plaintiff insists that defendant is shown, by instruction No. 7 given on its behalf, to have tried the case on the theory of a charge of "negligence in the operation of its plant," and that defendant cannot now limit the negligence to the maintenance of the oil burner. This conten-

tion cannot be sustained. Defendant tendered instruction No. 7, ending with, "....if the plaintiff failed to show by a greater weight of the evidence that the defendant was guilty of negligence in the operation of its plant, just before and at the time of the alleged occurrence, then the jury must find the defendant not guilty." In giving the instructions to the jury the court read this instruction through the words "alleged occurrence," when he stopped and said, "I think that is one I called your attention to. You can read it over. I will withdraw that for the time being." Counsel for defendant then said, "Would you lay it aside and let us discuss it before you read it?" In the discussion out of the presence of the jury, counsel requested "that the word be changed from 'plant' to 'oil burner' because the complaint does not allege any negligence in the operation of the plant, only the oil burner. I would not want it to appear we were going on the theory there was any negligence charged in the operation of the plant." The court refused to make the change and, over the objection of defendant, gave the instruction as written. In this the court erred. The record shows that the defendant was at all times attempting to limit the issue to the alleged negligence in the maintenance of the oil burner and not the entire plant. The use of the word "plant" was plainly an error, and the court evidently thought so or he would not have withdrawn the instruction in the first instance. The giving of the instruction after the interruption served to emphasize the alleged negligence as to the entire plant. It is fundamental that the plaintiff must prove the negligent acts charged and cannot recover by reason of negligent acts of the defendant not averred in the complaint as a ground of recovery, even though the acts proven show the defendant was guilty of negligence

which caused the injury. Miller v. Chicago & N. W. Ry. Co., 347 Ill. 487, 493; Buckley v. Mandel Bros., 333 Ill. 368, 373. The uncontradicted evidence of plaintiff's witness - the representative of Enterprise - is that the boiler is not a part of the oil burner unit. It is further shown, without contradiction, that the breeching, flue and damper are part of the boiler and not of the oil burner. It is also shown by plaintiff's witness that the oil burner was working satisfactorily and was properly maintained. There is no evidence supporting the charge that defendant negligently maintained the oil burner. The motion for judgment notwithstanding the verdict and special finding should have been allowed.

The judgment is reversed.

REVERSED.

Feinberg, P. J., and Tuohy, J., concur.

44615

ROOSEVELT McKAY,
Appellant,

v.

JACK ELLIS and ANNA ELLIS,
also known as ANNA WALTON,
Appellees.

APPEAL FROM CIRCUIT
COURT COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order striking his fifth amended complaint and dismissing his action for the dissolution of an alleged partnership and an accounting as to the assets and income of the partnership.

This action was commenced August 13, 1945 as a trespass action based on the alleged forcible ejection of plaintiff from the premises of the partnership and prevention of his participation in the management and operation of the business. The second count charged malice. On May 29, 1947 an order was entered finding the issues on the second count for the defendants and entering judgment accordingly on that count. The record shows no disposition as to count one except the filing on June 5, 1947, by leave of court, of an amended complaint in equity seeking the dissolution of the partnership and an accounting as to its assets and income. This amended complaint and the second, third and fourth amended complaints were stricken on motion of defendants. The fifth amended complaint, filed March 22, 1948, charges the purchase by plaintiff from defendant Jack Ellis of certain goods, chattels, fixtures and goodwill of a tavern business known as the Turk Club, located at 3901

1.

South Parkway, Chicago, Ill., for $1,100; the sale of an undivided one-half interest in such business on September 24, 1942 to one Beverly Miles, who sold the interest thus acquired on October 27, 1942 to the defendant Anna Walton; an oral agreement between Anna Walton and plaintiff within a week thereafter "by the terms of which the parties agreed to share equally in the profits and losses of the said Turf Club, and that the parties agreed to spend an equal amount of time in working and managing the business; that thereafter the parties did operate such business under the terms of this agreement as co-partners and as a co-partnership; that such co-partnership still exists and has not been dissolved. (Paragraph 5): That on or about November 2, 1942, the plaintiff and the said Anna Walton, defendant herein, orally agreed to suspend temporarily the operation of the Turf Club, but not to terminate said partnership for several weeks, or until such time as an assignment of the lease could be procured in the name of the partners; that said business closed its doors and suspended business on said date; that on or about December 20, 1942 the defendant, Anna Walton, obtained an assignment of the lease to the Turf Club from Jack Ellis, which assignment was approved by the lessor named in such lease, and the said Anna Walton commenced the operation of such business under her own name, and the said Anna Walton is presently operating such Turf Club"; that without the permission or consent of plaintiff, the defendant, Anna Walton, changed the name of the business from Turf Club to Casa Blanca; that she did not advise plaintiff that she had obatined the lease to the premises in which the business of the partnership was being

conducted, and also a renewal of such lease; that she has continued to operate the business and has earned large sums of money therefrom, and had failed to account to the plaintiff for any moneys so earned; that the plaintiff was and would have been at all times ready and able to go back into such business as a partner if he had known of the foregoing matters but that such matters and things came to his knowledge on June 2, 1947; that the defendant, Anna Walton, is and has been antagonistic towards the plaintiff, and on account of such antagonism the parties cannot remain in business as partners. Plaintiff asks that the partnership be dissolved, that a receiver be appointed, and that after payment of the indebtedness of the partnership the proceeds and residue be divided between plaintiff and Anna Walton according to their respective rights. On March 30, 1948 this fifth amended complaint was stricken for failure to allege a cause of action, and plaintiff's suit dismissed.

The fifth amended complaint alleges the joint ownership with defendant Anna Walton of the chattels and fixtures contained in the Turf Club, and an oral agreement whereby they were to share equally in the profits and losses of the business and to spend an equal amount of time in working and managing the business; the temporary suspension of the business until an assignment of the lease to the partnership could be obtained and the secret acquisition of this lease by the defendant Anna Walton, and the operation of the business at a profit by defendant. This sufficiently alleges a partnership (Leeds v. Townsend, 228 Ill. 451) and brings the case within the rule announced in Thanos v. Thanos, 313 Ill. 499. The motion to strike should have been overruled

and the defendants be required to answer so that the case might be determined on its merits.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views expressed herein.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Feinberg, P. J., and Tuohy, J., concur.

44647

TRUST COMPANY OF CHICAGO,
Administrator of the estate
of JOHN EDWARD LAHEY, Deceased,
Appellant,

v.

STORIT WAREHOUSE, INC., a corporation, and FRED REED,
Appellees.

APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff, administrator, appeals from a judgment entered on a verdict directed for the defendants at the close of plaintiff's evidence in its action for the wrongful death of decedent, a child aged 5-1/2 years.

The accident resulting in decedent's death occurred in the north and south alley east of Halsted street, between 61st place and 62nd street, in Chicago. Ten or fifteen minutes before the accident decedent was in the alley walking back and forth and talking to Frances Weight, age 10, Loretta Porter, age 7, and Patricia Lahey, his sister, age 7, who were playing on Loretta's back porch. Shortly thereafter, each of the girls testified, they heard a bump, like a car running over a crate, or a noise in the alley and saw a red truck moving in the alley, and then saw decedent lying there. Defendant Reed, the driver of the truck, who was also the owner, hauling for defendant corporation, testified to having made a delivery from the alley north of 61st place; that he then drove south to 61st place, west to Halsted street, south to 62nd street and then east on 62nd street to the alley, when he turned north into the alley, clearing the

sidewalk; that he did not make a delivery there but backed out to a warehouse across the street on the south side of 62nd street; that in backing out he looked through the rear view mirrors on the sides of the cab of the truck, that he saw no child and felt no bump. This is all the testimony relating to the accident. There is nothing to indicate how decedent came to his death. Neither is there any fact shown from which an inference of negligence on the part of the driver is warranted. The court did not err in directing a verdict. Casey v. Chicago Rys. Co., 269 Ill. 386, and Coulson, Admx. v. Discerns, 329 Ill. App. 28.

Plaintiff moved to withdraw a juror and continue the cause because of the absence of a witness who would testify that he was looking out of the back door of his store at 6147 south Halsted street when he saw a red truck coming south in the alley at about 25 miles per hour; that the truck had on its side a legend "Store it with Storit"; that shortly thereafter a police car came up; that the witness went outside and learned about the accident to decedent. This testimony, if produced on a trial, would contribute nothing towards showing how the decedent met his death or showing any negligence on the part of the defendants. The court properly denied the motion.

The judgment is affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.

44766

In the matter of the Estate of ARTHUR HEUER, deceased. FRED W. HEUER, ELSIE DEEG, GEORGE J. HEUER, HARRY HEUER, ANNA MATHISEN and HANS HEUER, Appellants, v. HARRIET S. HEUER, Administratrix of the Estate of ARTHUR HEUER, deceased. Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

On July 22, 1947 the administratrix of the estate of Arthur Heuer, deceased, was authorized by the Probate court of Cook county to convey to the Chicago Housing Authority certain real estate which deceased had contracted to sell, upon payment of the purchase price of $35,000, "less any sum which may be determined upon proration made as of the date hereof." On the following day the administratrix conveyed the premises and received $34,369.89. November 6, 1947, the brothers and sisters of deceased, hereafter called petitioners, filed their petition in the Probate court asking that the administratrix file an additional bond to cover the amount realized from the sale of this real estate; that the inventory be corrected to show real estate instead of personal property and that the proceeds from the sale be distributed in accordance with the rules of descent covering real estate. The administratrix, hereafter called respondent, answered and on April 5, 1948 an order was entered in the Probate court directing respondent to file an additional bond of $11,000

and denying all other relief asked by petitioners. On appeal to the Circuit court the further relief sought was again denied. Petitioners appealed to the Supreme court and that court transferred the case to us (402 Ill. 238).

Petitioners say "There is only one question involved here, namely: was there equitable conversion under this offer of sale." Deceased by written offer dated September 30, 1946, offered to sell the premises involved herein to the Chicago Housing Authority for $35,000. On November 22, 1946, within the time fixed in the offer for acceptance, the housing authority accepted the offer. The offer of sale contained the following provision: "Notwithstanding the prior exercise of this offer, the Authority in lieu of completing the purchase of said premises may, at any time prior to closing, proceed to acquire the same by condemnation. The seller agrees, as an independent stipulation, which shall survive the expiration or cancellation of this offer, to such condemnation upon the payment of just compensation, which shall be the purchase price above stated, which price the seller hereby declares to be the fair market value of said premises, inclusive of every interest." Petitioners contend that the election given the housing authority to start a condemnation proceeding after acceptance of the offer renders the contract unilateral because, petitioners say, "Under condemnation they could not be forced to take the property and pay the money if they did not want to, hence no conversion." In this position petitioners misconceive the effect of the language used. The option given the housing authority, after accepting the offer of sale, is not to start a condemnation proceeding but to acquire the property by condemnation,

paying therefor the stipulated purchase price. This provision was evidently inserted to afford to the housing authority the means to acquire the property for the stipulated price in the event some question as to the title arose. After accepting deceased's offer of sale the housing authority was bound to acquire the property by deed or through condemnation proceedings and pay therefor $35,000. In the event title was acquired through condemnation proceedings the purchase price would be paid into court and distributed among various claimants, if there were any other than deceased, as the court might direct. The contract is bilateral and a conversion was effected when the housing authority accepted the offer. The administratrix therefore properly inventoried the contract between deceased and the housing authority as personal property. Rhodes v. Meredith, 260 Ill. 138, Fuller v. Bradley, 160 Ill. 51, and Skinner v. Newberry, 51 Ill. 203. This conclusion is not affected by the provision in the offer that loss or damage to the property by fire or casualty shall be at the risk of the seller until title has been conveyed to the authority. The conversion having been effected, the proceeds are distributable as personal property.

The judgment is affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.

44518

In the Matter of the Estate of THEODORE THOMPSON, Deceased,	
LEONA THOMPSON, Appellant, v. WILLIE THOMPSON, Administrator of the Estate of THEODORE THOMPSON, Deceased, Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Claimant filed her verified claim against defendant in the Probate Court of Cook County seeking compensation for services allegedly performed for defendant's intestate during his lifetime. The claim was disallowed in the Probate Court and on appeal to the Circuit Court, after hearing there, was disallowed. This appeal is taken from the Circuit Court order of disallowance.

Claimant maintains that in the absence of an express contract to pay for the services of another the recipient of such services is bound to pay for the same upon an implied contract and that she is entitled to the fair, reasonable, and customary value of said services.

Defendant admits the propositions of law relied upon but maintains that the facts in the instant case establish that claimant and defendant's intestate had lived together for many years as husband and wife, though not married, and where such a relationship exists neither party may recover from the other for services rendered

in the absence of an express agreement, but such services are presumed to be gratuitous.

The briefs of the parties in the case indicate no substantial disagreement as to the law. In her reply brief claimant says, "If illicit cohabitation were the basis of claimant's case, it is conceded that her claim would fail." The law is well established in this State that in the absence of an express agreement where two parties not legally married live together as husband and wife neither party may recover from the other for services rendered. McClelland v. Gorrell, 334 Ill. App. 132, and Usalatz v. Estate of Pleshe, 302 Ill. App. 392. Claimant insists, however, that "since 'illicit cohabitation' was not mentioned in the trial court that point cannot be made for the first time in a court of review." We find no merit in this contention of claimant. While there were no pleadings filed in this case in view of the fact that it came to the Circuit Court on an appeal from the Probate Court with merely a verified statement of claim to support it, the case was obviously tried upon the theory that defendant's intestate and claimant lived together as man and wife. In the opening statements of counsel the point was very clearly made. It was so argued at the conclusion of the hearing, and while the phrase "illicit cohabitation" does not appear in the evidence, it clearly and obviously was defendant's position throughout the trial that he was not liable by virtue of a relationship which, under the law, excluded any implied promise to pay for services. The evidence discloses that claimant was commonly known as, and was introduced by defendant's intestate as his wife,

that they lived together in a three room apartment for a great many years, and that claimant performed for defendant's intestate those services ordinarily performed by a housewife. As further evidence of the holding out of the claimant by deceased as his wife are the exhibits in evidence, produced by the claimant, consisting of mortgages and deeds in which deceased is named as grantor and the claimant described as his wife. There were also bills for insurance premiums made out to Mrs. Theodore Thompson. While no direct proof bearing upon intimate conjugal relationships was offered, we do not believe that under the facts in this case it was necessary. The court heard the witnesses fully, and the inferences from undisputed facts were for the court to determine. We find his conclusion justified by the evidence. Therefore, the order of the Circuit Court disallowing the claim is affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.

44606

LEONARD E. STEELE, Appellant, v. CLARE A. SULLIVAN, Executrix of the Estate of THOMAS E. SULLIVAN, Deceased, and JAMES W. BURKE, Trustee under Trust No. 101, Appellees.	APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree of the Superior Court of Cook County dismissing his bill for want of equity. The bill alleges that in May, 1943, Thomas E. Sullivan and plaintiff entered into an oral agreement to purchase certain real estate held by defendant James W. Burke as Trustee; that the real estate was to be acquired with funds provided by Sullivan in the name of his nominee and that Sullivan would cause title to be conveyed to a trust company which would issue certificates of beneficial interests showing plaintiff and Sullivan to be owners of undivided one-half interests therein; that the property thus acquired would be subdivided and the property sold, and that plaintiff would perform certain services in the clearing of the title and setting up and selling of the subdivision. He alleged performance on his part, and prayed that Burke be restrained from assigning or canceling the contract of sale between Burke and Sullivan and that the latter be directed to record the deed of conveyance given by Burke and be directed to execute a deed to a trust company conveying title to the property.

The answer denied any partnership or any oral agreement as set forth in the complaint, but asserted that if any oral agreement existed as set forth in the complaint, it would be within the statute of frauds.

Prior to the trial of the issues Sullivan died, and his widow, Clare A. Sullivan, as Executrix, was substituted as party defendant.

In his presentation of the case here, plaintiff makes no argument on the questions as to the existence of the partnership and the oral agreement for the acquisition of the real estate and division of the profits from the sale of the subdivision. His only reference to these important issues is the statement, unsupported by the record, to the effect that the oral agreement embodying these matters was admitted by Mr. Sullivan. He assigns as error only the proposition that the oral agreement was not within the statute of frauds or "that even if it were within the statute of frauds the defendant Thomas E. Sullivan, or his estate, is liable to respond in damages for the reasonable value of services which were actually rendered for his benefit because of the contract."

Defendant contends that plaintiff failed to sustain his burden of establishing a partnership and oral agreement and argues that even if the oral agreement were proved it would be within the statute of frauds. She assigns as cross errors (1) the trial court's admission into evidence of a transcript of the plaintiff's testimony after the death of Thomas E. Sullivan, which was taken at a hearing before a master in chancery, and (2) the trial court's

admission into evidence of the transcript of testimony of various other witnesses taken at the hearing before the master, in the absence of proof of the plaintiff's inability to produce those witnesses at the trial or to secure their testimony by deposition.

The cause was filed on July 1, 1946. On November 14, 1946 it was referred to a master in chancery. On July 21, 1947 the plaintiff called and examined the defendant Thomas E. Sullivan under Section 60 of the Civil Practice Act, and on July 23, 1947 plaintiff testified before the master in his own behalf. The cause was continued by the master and on August 18, 1947 Sullivan died, and thereafter, before submission of the cause to the chancellor, the term of the master in chancery expired. The cause came on for hearing before the chancellor on May 18, 1948. The transcript taken before the master was offered in evidence. Objection was made on the ground that complainant was incompetent to testify either in person or by deposition under Section 2 of the Evidence and Depositions Act (Ill. Rev. Stat. 1947, ch. 51, par. 2) which provides that no party in interest shall be permitted to testify "when any adverse party sues or defends * * * as the executor * * * of any deceased person" etc. Objection was also made to the admission of a transcript of testimony of various witnesses other than plaintiff in the absence of proof of the plaintiff's inability to produce the witnesses at the trial or his inability to secure their testimony by deposition.

The question of whether or not an oral agreement as alleged in the complaint and denied by the answer existed

between plaintiff and Thomas E. Sullivan involved disputed questions of fact. Even if there were competent evidence to support plaintiff's theory, we would not be inclined to interfere with the finding of the trial court who apparently considered all the testimony introduced before the master and before himself. However, we are of the opinion that the admission in evidence by the chancellor, over objection, of the plaintiff's testimony taken before the master in chancery was error, being in contravention of Section 2 of the Evidence and Depositions Act. The fact that Sullivan was living at the time the testimony was adduced before the master does not render it competent to be received in evidence at a subsequent trial held after his death. Smith v. Billings, 177 Ill. 446.

In the absence of plaintiff's testimony there is no evidence of any moment to support the allegations of the complaint. In our view of the case it is unnecessary to consider any of the other alleged errors or cross errors assigned. The order of the Superior Court of Cook County dismissing the bill for want of equity is affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.

44618

JULIA VAN ULM and JOSEPH VAN ULM, Appellees,	)	
v.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
LEO BERRINGTON, SAM SCHRIER, and ANNETTE ORLOFF, doing business as CLARITE LIQUOR STORE, Appellants.	)	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff Julia Van Ulm filed her suit for personal injuries sustained in a fall on the premises operated as a liquor store in Chicago, Illinois by defendants. Plaintiff Joseph Van Ulm, husband of Julia, joined his cause of action for loss of services based upon the same facts. From a judgment in favor of Julia Van Ulm for $6,500 and in favor of Joseph Van Ulm for the sum of $50, defendants appeal.

The complaint alleges substantially that on May 4, 1945 Julia Van Ulm, while an invitee in defendants' liquor store, fell through a trap door negligently left open and unguarded by the defendants. The answer denies that the trap door through which plaintiff Julia Van Ulm fell occupied any part of the floor to which patrons were invited, but alleges that the same was behind a counter at a place where patrons were neither invited nor permitted; denies that Julia Van Ulm was in the exercise of due care for her own safety; and asserts that she was either a trespasser or a licensee to whom no duty of ordinary care was owed.

Defendants urge that there should have been a directed verdict as to all, and also complain of the

admission of certain x-rays and medical testimony.

Defendants' place of business at 2606 North Clark Street, in the City of Chicago, faced east, and was known as Clarite Liquor Store. The front part of the premises was used for retail sale of packaged liquor and the rear portion as a tavern. The front portion of the premises was separated from the barroom by a large refrigerator which extended the width of the store except for a six foot passageway along the north wall. The store is fifteen feet wide, and the icebox nine feet wide. Along the entire south side of the front or package goods part of the store was a counter, extending from the east wall to a point four feet east of the refrigerator, where a short "stub" counter projected north at right angles from the end of the counter running in front of the refrigerator to the passageway connecting the package goods part of the store with the barroom in the rear. Behind the counters, or that portion of the store where the package goods were dispensed, was a trap door leading to the basement. This trap door was located along the south wall and was about six feet long and three or four feet wide. To reach the door it was necessary to walk behind the "stub" counter for its entire length. The space behind the counter and in front of the refrigerator was about three and one-half feet wide. The area behind the "stub" counter was well lighted, from fluorescent lights in the ceiling and lights in the interior of the refrigerator shining through the glass doors onto the floor. There was no way to get behind the main counter along the south wall of the store except by walking south behind the "stub" counter and in front of the

icebox to the area occupied by the trap door. On the counter were a cash register and cradle telephone. There was also on the premises a telephone booth for the use of patrons of the store, which was in the main body of the store and accessible without going behind the counters.

The testimony, which is substantially undisputed, was to the effect that Julia Van Ulm went into the premises about 6:30 P. M., met her husband, and had a drink with him at the bar. Sometime later she went out and purchased food and brought it back to the bar where they both ate. About 8:30 Julia left the tavern for about fifteen minutes, returned again, sat at the bar, and had another highball with her husband. Her husband refused to go home and she left around 9:30, and later, for the fourth time that evening, returned to the tavern. When she came back on this occasion she saw her husband still at the bar, talking to a friend, and went over to him, sat down on the stool, and had another drink. After sitting there for a half hour or so she missed her husband and found that he was not at the bar. Thereupon she got up and left the bar and went through the passageway toward the package goods portion of the premises. About 11:00 o'clock that evening an employee of the defendants had opened the trap door and had gone down to the basement to bring up beer for the following day's business, leaving the trap door open. The cellar was brightly lighted, and the light from the cellar shone up through the open trap door. Plaintiff testified that after leaving the barroom and going into the package room part she asked the proprietor if he had seen Mr. Van Ulm. In the meantime,

she had turned into the aisle behind the counter "and as I was walking through this passageway, in front of the icebox, still asking him, I fell." On cross-examination she testified that while walking toward this trap door she did not at any time look at the floor ahead of her to see where she was going.

It clearly appears that the accident happened upon a portion of the premises which was used by the employees of the store as an aisle and which was located behind this "L" shaped counter. It also appears that it was a portion of the premises to which the public and the patrons of the store were not generally invited, although they were on occasion permitted.

Plaintiff takes the position that by a course of past conduct defendants had impliedly invited the plaintiff, as well as other patrons of the store, to use the portion of the premises where the accident happened. They cite the testimony that Mr. and Mrs. Van Ulm had on occasion been permitted to use the phone behind the "stub" counter, that it was customary for patrons to go in and get beer out of the icebox, and that the Van Ulms had frequently used the icebox for the purpose of placing packages there.

We fail to see how this course of conduct makes plaintiff anything more than a mere licensee. The evidence is undisputed that the telephone which was maintained for the use of patrons of the place was a booth phone and located in a portion of the store where there could be no possible danger from an open trap door. The telephone on the counter was for the use of the operators of the business, and while incoming calls were sometimes relayed to patrons , it would

appear that it was solely for their convenience and that this occasional use of facilities by patrons was merely permissive. From a review of all the testimony in this case, we are of the opinion that plaintiff was a trespasser, or at most a licensee, on that portion of the premises where the accident happened and that defendants owed her, as such, no duty other than not to willfully and wantonly injure her. No such question is here involved.

Furthermore, we conclude, under all the facts and circumstances in this case, that the accident happened with the proximate and concurring negligence of the plaintiff Julia Van Ulm. This being our view of the case, it is unnecessary to consider the alleged errors in the admission and denial of evidence.

Under the circumstances, we are of the opinion that the trial court erred in refusing to direct a verdict for the defendants, and for such reason, the judgment of the Circuit Court of Cook County is reversed.

REVERSED.

Feinberg, P. J., and Niemeyer, J., concur.

44639

MARJORIE WALDEN, also known as MARJORIE EMRICH, Appellant,	337 I.A. 292
v.	APPEAL FROM CIRCUIT COURT COOK COUNTY
CHELSEA HOTEL COMPANY, a Corporation, Appellee.	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Marjorie Walden, also known as Marjorie Emrich, plaintiff, sued defendant Chelsea Hotel Company, a corporation, to recover damages for personal injuries sustained on April 25, 1946 as a result of an assault and battery by Fred McCool, defendant's employee. The case was heard by a jury which assessed plaintiff's damages in the sum of $3,500, and from a judgment for defendant notwithstanding the verdict plaintiff appeals.

Plaintiff contends that by virtue of the relationship of innkeeper and guest existing at the time of the assault the defendant owed plaintiff an absolute duty "to protect her from harm by its servants, particularly by a servant having a key to her room which key was furnished by defendant to the servant."

The defendant's theory is that the proof in the case was insufficient to show that the servant of the defendant hotel committed the assault upon the plaintiff while in the performance of his duties.

Inasmuch as the defendant introduced no evidence, the following facts are unrebutted: On April 25th plaintiff

was a guest at the Chelsea Hotel which was owned and operated by defendant. She had lived at the hotel for about ten months prior to the date of the occurrence complained of, occupying one room with connecting bath, the hotel furnishing daily maid service, clean linens and bellboy service. The door of her room had a spring type Yale lock which automatically locked the door upon closing. On the above date she returned to the hotel from her duties as waitress about five-thirty in the morning. She locked the door, and retired to bed. About eleven-thirty she was awakened by three severe blows on the head inflicted by a man wielding a metal instrument. She was taken to a doctor's office, and he took x-rays and inserted four stitches in her head in each of the three places she was struck.

In the answer filed in this case defendant admits that the assailant, Fred McCool, was a servant of the defendant and that he entered the room of the plaintiff, but denies that in so doing he was acting within the scope of his employment. Defendant admits that McCool had been employed by it approximately about five months prior to the occurrence as a "houseman" and that in connection with his duties he was furnished by this defendant with a passkey by which he might enter the rooms of the hotel. Defendant contends that there was no evidence establishing that the relationship between McCool and defendant was such that he might be presumed to be authorized to make the assault or that the assault was within the scope of his employment, and that there was no evidence establishing any negligence on the part of the defendant in the employment of McCool.

It is to be noted that plaintiff, in her theory of the case, claims that she was injured as a result "of a violation by the defendant of an absolute duty owed to the plaintiff, to protect her from harm by its servants." This is in effect a statement that an innkeeper is an insurer of the safety of its guest. No authorities are cited, nor do we find any, to support this view. The defendant was obligated in this case only to use ordinary care for the safety of the plaintiff. Pollard v. Broadway Central Hotel Corp., 353 Ill. 312, 319. It does not appear that defendant violated its duty of ordinary care to the plaintiff in the unfortunate occurrence of which plaintiff was the innocent victim. It is argued that because the employee had been entrusted with a passkey which opened plaintiff's door that that fact imposes responsibility upon defendant for the employee's felonious act. We do not understand this to be the law unless at the time the assault was committed the employee was engaged expressly or impliedly upon the master's business and acting within the scope or apparent scope of his authority. The record is silent as to any facts which would tend to bring the employee within this rule. It is true that if the master were negligent in employing the servant and might have discovered by reasonable diligence that he was the type of person to whom it would negligence to entrust such responsibility, then the master would be liable regardless of the mission upon which the employee was engaged at the time of the assault. However, there is no proof and no charge in the complaint that there was any negligence in the employment of McCool or in the

entrusting to him of a passkey. Again, it does not appear from the evidence or from any reasonable inferences that may be drawn therefrom, that the assault committed by the employee was within the scope of his employment.

In the case of Buckley v. Edgewater Beach Hotel Company, 247 Ill. App. 239, this court said, at page 245:

> "In the case at bar, it is admitted that McAlvany was employed as an officer, for the purpose of protecting the interests of the hotel company, and it cannot be assumed that he was employed for the purpose of intentionally inflicting injury upon anyone, but that, in the course of his duty, he was expected to do those things which an officer occupying such a position as he did with the hotel company, would be ordinarily expected to do."

Also material on this point are the cases of Shannessy v. Walgreen Company, 324 Ill. App. 590; Ewald v. Pielet Scrap Iron & Metal Co., 310 Ill. App. 218; Klugman v. Sanitary Laundry Co., 141 Ill. App. 422.

We therefore hold that the defendant in this case owed the plaintiff only a duty of ordinary care to prevent injury to her while a guest of defendant's hotel. The evidence discloses no violation of that duty. We fail to find any evidence supporting the allegations of the complaint, and, therefore, the action of the Circuit Court of Cook County in entering the judgment notwithstanding the verdict is affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.

44673

INLAND RUBBER CORPORATION, a corporation, Appellee, v. ESKIMO KOOLER CORPORATION, a corporation, and NICHOLAS C. GIOVAN, Defendants	APPEAL FROM CIRCUIT COURT COOK COUNTY
On Appeal of NICHOLAS C. GIOVAN, Appellant.	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendant Nicholas C. Giovan appeals from a summary judgment entered in favor of Inland Rubber Corporation, a corporation, the plaintiff, in the amount of $3,881.22.

The complaint alleges that Eversharp Lawn Mower Corporation purchased a tire mold and certain special rubber tires from plaintiff; that prior to the acceptance and fulfillment of the order, defendant, by letter, guaranteed the payment of the account; that thereafter, the merchandise having been manufactured and delivered, $500 was paid on the account, but that Eversharp failed and refused to pay the balance. The letter of guaranty is as follows:

"Eskimo Kooler Corporation
916 East 43rd Street
Chicago 15, Illinois

November 27, 1946.

Inland Rubber Corp.,
33 South Clark St.,
Chicago, Ill.

Attention Mr. T. T. Swanson.

Gentlemen:

Pursuant to your request regarding the order placed with your company by the Eversharp Lawn

Mower Corp., on November 26, 1946, we do hereby wish to inform you that we guarantee payment of said account in the event of default.

[signed] Very truly yours,
Nicholas C. Giovan,
President."

The answer admits the purchase and sale and the writing of the alleged letter of guaranty but "denies that the agreed price of said mold and said tires would be paid when said mold was procured and said tires were delivered by plaintiff to 'Eversharp', because there was no agreed price stipulated or fixed."

In the affidavit for summary judgment the credit manager of the Inland Rubber Corporation swore substantially to the following facts: that he would not approve the credit of Eversharp unless a guaranty of the order was received by the plaintiff from some responsible person or corporation; that after receipt of the guaranty from defendant, but before the shipment of any tires; plaintiff forwarded to Eversharp a letter stating in detail the prices to be charged to Eversharp for the tires and mold. A copy of this letter is attached to the affidavit and made a part thereof and shows the price to be $4,381.22. The affidavit further sets forth that no objections were ever made by Eversharp or its representatives to the amounts of its invoices, or any portion thereof.

Defendant's theory is that because the letter of guaranty did not specifically state the amount guaranteed that he is entitled to have a jury determine the fair and reasonable sale price of the merchandise. The counter affidavit does not dispute the fixing of the price at $4,381.22 prior to the delivery of the merchandise, nor does it dispute the

allegation that no objection to the price stated was ever made by Eversharp. Plaintiff's position is that the purchase price of the merchandise was definitely fixed in writing by its letter of December 17th to Eversharp, and that is the amount for which defendant is liable under the terms of the guaranty.

We are of the opinion, inasmuch as the original parties to this purchase and sale agreement had a definite understanding as to the price that was to be paid, as no objection as to the price was ever raised by the purchaser or by the guarantor, as the letter of guaranty is clear and unambiguous on its face, and as the making of the contract and the delivery and receipt of the goods are admitted, that the trial court was justified in entering a summary judgment on the pleadings.

The guaranty need not be limited as to either the amount guaranteed or to the time for which it is to remain in effect. Mamerow v. The National Lead Company, 206 Ill. 626; The Delaware, Lackawanna and Western Railroad Co. v. Burkard, et al., 114 N. Y. 197.

Defendant further contends that because the letter of guaranty was written on the letterhead of the Eskimo Kooler Corporation there is ambiguity and uncertainty as to whether or not the guaranty was a corporate or individual undertaking. The corporation was made a party to the case as originally filed, and was dismissed on motion. We think it clear from a reading of the letter of guaranty that the undertaking was that of the defendant personally and not of the corporation. The fact that the word "President" appears following his signature is merely descriptive, and

does not tend to make the instrument ambiguous. The rule is stated in 32 C. J. S. §990, at page 962:

> "Where, however, the legal effect of an instrument is to bind the officers by whom it is signed alone, and the name of the corporation does not appear on the instrument in such a way as to render it doubtful from the paper itself whether the corporation or the officers were intended to be bound, parol evidence is not admissible to show that the officers acted only in their official capacity * * *."

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.

44683

LAWRENCE S. SCHWARTZ and FREDA SCHWARTZ, Appellees,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
EUGENE LEVY and JEAN LEVY, Appellants.	)	COOK COUNTY

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued to recover against defendants on a contract wherein defendants promised to pay the sum of $25 for each day after March 1, 1946 that they occupied a bungalow previously sold by defendants to plaintiffs. The case was submitted to the court without a jury on a stipulation of facts. From a judgment in favor of plaintiffs in the sum of $1,300 and costs, defendants appeal.

On December 14, 1945 plaintiffs and defendants entered into a real estate contract for the purchase and sale of a five-room brick bungalow located in Chicago, Illinois. The seller was occupying the premises at the time the agreement was made, and there was a provision that possession would be surrendered on or before 60 days after the date of sale. On the closing date, the defendants delivered to plaintiffs a letter stating that in the event the defendants did not remove their possessions and vacate the premises on or before March 1, 1946 "we will pay you $25.00 per day for each day we remain in possession thereafter and your acceptance of any sums in accordance herewith shall not construe [sic] a Waiver by you of your rights of entering the premises." At the same time the letter was executed and delivered, there was an oral agreement between the parties

that the defendants would pay to the plaintiffs, as rental for the 60 day period, the sum of $57.50 per month. Thereafter, on February 26, 1946, there was an agreed extension of the occupancy by defendants at the same rental until March 31, 1946, and again on March 22nd there was a further extension at the same rental, to May 1st. On the latter date, plaintiffs filed suit in forcible entry and detainer. On June 4th judgment for possession was entered, and defendants vacated the premises on June 21st. The amount of damages provided for in the judgment order was computed on the basis of $25 per day from May 1 to June 21, 1946.

Defendants contend that the provision in the agreement as to the amount of damages being greatly in excess of the actual damages suffered, it should be treated as a penalty and that no more than the actual damages proved should be recovered.

Plaintiffs' theory is that the provision in this contract for a particular sum to be paid in the event of a breach is not in the nature of a penalty because the damages resulting would be difficult to estimate, and circumstances render their computation uncertain.

It appears to us from the stipulation of facts herein that the $25 a day provision was made for the purpose of securing performance, and not with a view to estimating or determining actual damages. In the case of Advance Amusement Company v. Franke, 268 Ill. 579, where the court considered a somewhat similar state of facts, the court said (pp. 581, 582):

"As was said by this court in Gobble v. Linder, 76 Ill. 157, no branch of the law is involved in more obscurity by contradictory decisions than whether a sum named in an agreement to secure performance will be treated as liquidated damages or a penalty, and as each case must depend upon its own peculiar and attendant circumstances, general rules of law on this question are often of little practical utility. While the intention of the parties on this question must be taken into consideration, the language of the contract is not conclusive. The courts of this State, as well as in other jurisdictions, lean towards a construction which excludes the idea of liquidated damages and permits the parties to recover only damages actually sustained. (Scofield v. Tompkins, 95 Ill. 190; Radloff v. Haase, 196 id. 365; Bilz v. Powell, 38 L.R.A./ N.S./ 847, note.) This court has said that the rules deducible from the cases may be stated as follows: 'First, where by the terms of a contract a greater sum of money is to be paid upon default in the payment of a lesser sum at a given time, the provision for the payment of the greater sum will be held a penalty; second, where by the terms of a contract the damages are not difficult of ascertainment according to the terms of the contract and the stipulated damages are unconscionable, the stipulated damages will be regarded as a penalty; third, within these two rules parties may agree upon any sum as compensation for a breach of contract.' (Poppers v. Meagher, 148 Ill. 192.) This and all other courts seem to agree upon the principle that a stipulated sum will not be allowed as liquidated damages unless it may be fairly allowed as compensation for the breach. (I Sedgwick on Damages,--9th ed.--sec. 407, and cases cited.) We have frequently said that courts will look to see the nature and purpose of fixing the amount of damages to be paid, and if it appears to have been inserted to secure the prompt performance of the agreement it will be treated as a penalty and no more than actual damages proved can be recovered."

Applying the rule laid down in this case to the case at bar, we conclude, first, that the purpose of the parties in fixing the amount of damages to be paid appears to have been to secure the prompt performance of the agreement. That being so, under the rule laid down in Advance Amusement Company v. Franke, supra, it must be treated as a penalty and no more than the actual damages proved can be recovered.

Furthermore, the parties themselves fixed the sum of $57.50 as the rental for the premises, and, presumptively, that was fair and reasonable. (Johnson v. Canfield-Swigart Co., 292 Ill. 101, 111; Clapp v. Noble, 84 Ill. 62.) The provision in the contract for $25 a day is at the rate of $750 a month, which would appear to us to be an unconscionable amount in view of the actual amount the parties themselves had agreed upon. In Elgin, Joliet & Eastern Railway Company v. Northwestern National Bank of Chicago, 165 Ill. App. 35, the court said at page 39:

> "Where the amount agreed to be paid for the breach of the contract greatly exceeds the actual damages suffered on account of the delay--that is to say, if the amount agreed to be paid is out of proportion to the probable damage sustained, the court will be disposed to treat the stipulated sum as a penalty and not liquidated damages."

Finally, inasmuch as the parties themselves had for a number of months prior to the forcible entry and detainer suit occupied a lessor-lessee relationship on an agreed monthly rental, it does not appear that the damages are difficult of ascertainment or their computation uncertain. Accordingly, we do not consider as applicable to this case the many authorities cited by plaintiffs to the effect that a provision in a contract for a particular sum to be paid in the event of a breach is not in the nature of a penalty where the damages which would result from a breach would be difficult to estimate and the circumstances render their computation uncertain. We are therefore of the opinion that the $25 a day provision was a penalty clause, that only actual damages may

be recovered, and that the actual damages have been fixed by the parties themselves as being the sum of $57.50 a month.

Accordingly, the judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions to proceed in a manner not inconsistent with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS

Feinberg, P.J., and Niemeyer, J., concur.

44697

FRANK J. SCULL, Appellee, v. WESTFIELD HOMES, INC., an Illinois corporation, and WILLIAM W. GOLDMAN, Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an order of the Superior Court of Cook County denying leave to open up a judgment by confession taken on a note and leave to file a counterclaim.

The motion and affidavit to open up the judgment set forth substantially the following facts: that the defendant corporation is owned by defendant William W. Goldman and has been since its incorporation in August, 1941; that plaintiff was a vice president and employee of said corporation, and from May 1, 1943 until the termination of his employment on May 4, 1945 he was paid a salary of $75.00 a week; that in October, 1943 the defendants purchased certain real estate located in the State of Wisconsin for a total consideration of $60,000; that for convenience the purchase was made in the name of plaintiff; that plaintiff had no interest whatsoever in the real estate other then as the nominee of the defendants and that all the consideration was furnished by the defendants; that at the time of the purchase a verbal agreement was made between plaintiff and defendants that plaintiff would convey title as the defendant William W. Goldman directed; that sometime after plaintiff left the employ of the defendant corpora-

tion the defendants requested that plaintiff convey his nominal interest in said real estate to the defendants, but that he refused and demanded a large sum of money for making such conveyance; that he threatened to involve defendants in long and costly litigation with unfavorable publicity, thereby injuring their business of selling real estate; that because of the demand and threats, and to secure an immediate title to the real estate, the defendants entered into an agreement with the plaintiff whereby and whereunder they agreed to pay him the sum of $10,000.00, evidenced by the installment note which is the subject matter of this suit; that thereafter the defendants paid in installments to plaintiff the total sum of $8,250.00 on account of said note, but refused to pay the balance.

No question of want of diligence is raised. After the filing of the motion and affidavit to open up the judgment, a motion to strike was filed, together with a counter affidavit. An issue of fact being raised by the affidavit to open and the counter affidavit, the judge before whom the matter came on for hearing called certain witnesses to testify for the respective parties, and at the conclusion of this hearing denied the motion to open up the judgment.

The authority for proceedings to open judgments by confession is contained in Rule 26 of the Supreme Court of Illinois, which provides in pertinent part as follows:

"A motion to open a judgment by confession shall be supported by affidavit in the manner provided by rule 15 for summary judgments, and if the motion and affidavit

disclose a prima facie defense on the merits to the whole or a part of the plaintiff's demand, the court shall set such motion down for hearing. The plaintiff may file counter affidavits. If, at the hearing upon such motion, it shall appear that the defendant has a defense on the merits to the whole or a part of the plaintiff's demand and that he has been diligent in presenting his motion to open such judgment, the court shall then sustain the motion either as to the whole of the judgment or as to such part thereof as to which a good defense has been shown, and the case shall thereafter proceed to trial" etc.

The question before us to determine is whether or not the trial court erred in holding that the motion and affidavit failed to disclose a prima facie defense on the merits to the whole or part of plaintiff's demand. Defendants' principal reliance is upon want of consideration. The affidavit above summarized sets out facts which, if proved, would establish such defense and counterclaim. No warrant is cited in the briefs, nor do we find any, for the filing of motions to strike affidavits to open a judgment or for the taking of oral testimony on controverted questions of fact. The rule is to the contrary. Stone v. Levinson, 228 Ill. App. 342; C. F. Birtman Co. v. Thompson, 136 Ill. App. 621. The trial court had no right to pass upon the controverted questions of fact or to deprive defendants, if they so elect, to their right of trial by jury. Kolmar, Inc. v. Moore, 323 Ill. App. 323; Stranak v. Tomasovic, 309 Ill. App. 177.

The order appealed from is reversed and the cause is remanded with directions to open the judgment and to grant leave to plead to the merits and to file a counterclaim.

REVERSED AND REMANDED WITH DIRECTIONS.

Feinberg, P. J., and Niemeyer, J., concur.

No. 10296

In the

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1948

JOHN S. STOPPER, Defendant-Appellant vs. GARY WHEATON BANK, a banking corporation, of Illinois, as trustee Plaintiff-Appellee	Appeal from the Circuit Court of DuPage County Honorable Win G. Knoch, Judge Presiding

BRISTOW, J. - - The circuit court of Du Page County entered a decree in this cause, the propriety of which this appeal questions. The facts in this case which are undisputed are as follows: The Gary Wheaton Bank, as trustee in its trust 134 acquired title to "The South half of lot 32 in Franzens Addition to Bensenville in Du Page County, Illinois" by a deed which was recorded on July 22, 1944. The grantor in that deed acquired all the right, title and interest of George Franzen in that property, pursuant to a sheriff's sale held June 7, 1943, under an execution having been levied thereupon. On May 12, 1928, George Franzen, with his wife conveyed the premises by trust deed to Albert Franzen, to secure two notes, each in the principal sum of $1,000.00, bearing interest and due three years after date, that is May 12, 1931; that on or

No. [illegible]

[illegible]

[illegible]

[illegible] corporation, [illegible]

Plaintiff - appellee

[illegible] deceased in [illegible] the property of [illegible]. The facts in [illegible] Perry Harrison [illegible]. The South Hall of [illegible] in [illegible] Du Page County, [illegible] by a [illegible] 1944. The premises in [illegible] [illegible] of Theodore [illegible] in [illegible] safe hold [illegible] thereupon. On May [illegible], [illegible] voted the premises [illegible] notes, each in the principal sum of $1,000.00, bearing [illegible] and due three years after date. That is May [illegible], 1923; [illegible] on or

about the due date the payment of the principal was extended by agreement in writing for another three years, namely to May 12, 1934. Extension interest notes were likewise executed and delivered; that this extension agreement was never recorded; that the trust deed was recorded on May 23, 1928; that there was default in the payment of inter st that was due November 12, 1933, all prior payments having been made while nothing was paid thereafter; that John S. Stopper was the owner of note number one, and Grace Helton was the owner of note number two.

The complaint filed in this case sought to have the lien of John S. Stopper created by the trust deed securing his note for $1,000.00 released and extinguished. The Court entered a decree granting the relief prayed for, holding that the ten year Statute of Limitations had run upon the notes and that the trust deed was null and should be released, and ordered the Master in Chancery to release the same in the event the trustee failed to do so. It is agreed that the sole question involved herein is one of law, namely, that the Court erred in determining that the Statute of Limitations not only barred the remedy but also barred the lien.

The trust deed in question having been unreleased constitutes a cloud upon appellee's title and the present proceeding is a proper one to remove the same. "In the case of Roby v. South Park Commissioners (215 Ill. 200) at page 203, our Supreme Court defines a cloud on the title as follows: 'A cloud on title is an outstanding claim or encumbrance which, if valid, would affect or impair the title of the owner, and which appears on its face to have that effect but which can be shown by extrinsic evidence to be invalid. A cloud exists where a title of an adverse party to land is valid upon the face of the instrument or the proceedings sought to be set aside, and it requires extrinsic facts to show the supposed conveyance to be inoperative and void.' "

It is conceded by appellant that his remedy to enforce his rights under his trust deed has been barred by the Statute of Limitations. "Section 11 of the Limitations Act (Ill. Rev.Stat. 1947, Chap. 83) with respect to mortgages provides : 'No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage unless within ten years after the right of action or right to make such sale accrues.'" Now the appellant presents the rather novel question: Does the trust deed unsupported by a valid debt continue and remain in force, separately and independently, as a valid lien against appellee's property? To answer this inquiry in favor of appellant, we would present a situation where there is a right to a lien and no remedy to enforce it.

We are of the opinion that appellant is in error in his contention that the lien of the trust deed creates in him substantive rights which endures beyond the life of the debt secured thereby. Our courts have repeatedly held that the debt alone gives rise or creates such substantive rights, and that the lien created by the trust deed is a part of the remedy. "The nature of the rights created by a Trust Deed are discussed by our Supreme Court in the case of Lightcap v. Bradley, 186 Ill. 510, the Court at page 522 saying: 'So, too, courts of law now regard the title of a mortgagee in fee in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the Statute of Limitations, the mortgagee's title is extinguished by operation of law. (Pollock v. Maison, 41 Ill. 516; Harris v. Mills, 28 id.44; Gibson v. Rees, 50 id. 383.) Hence the rule is as well established at law as it is in equity, that the debt is the principal thing and the mortgage an incident.

It is sometimes [illegible] appellant that his remedy to enforce his rights under his trust deed has been barred by the Statute of Limitations. The statute of the Illinois [illegible] (Ill. Rev. Stat. 1947, Chap. 83) which is pertinent to mortgages provides: "No person shall commence an action to make entry or lawful claim to any lands or to any rent or other profit or benefit out of the same, or any share or portion thereof, unless within twenty years after the right of action or entry or lawful claim shall accrue." Nor does the appellant prevail on the theory that a mortgagee should be considered a bona fide purchaser of the trust deed property if he has lent money in reliance upon the trust deed and has remained in possession, independent of any foreclosure proceeding. [illegible] of appellant, we find [illegible] to a lien or a mortgage is enforceable.

In one of the opinions of [illegible] in which [illegible] contention that the lien of the trust deed [illegible] rights which [illegible] and [illegible] Our courts have repeatedly held [illegible] or are less than mortgages of the [illegible] the trust deed [illegible] of the [illegible] cases of Lightcap v. Smalley, 167 Ill. [illegible] [illegible] Inc., [illegible] [illegible] place in [illegible] in the nature of a [illegible] form of its existence is measured by that of the mortgage [illegible] When the latter is paid off, or becomes barred by the Statute of Limitations, the mortgagee's title is extinguished by operation of law. (Pollock v. Madison, 1 Ill. 376; Hawley v. Mill, [illegible]; Gibson v. Jeans, 90 Ill. 603.) Hence the rule in an equitable [illegible] at law as it is in equity, that the debt is the principal thing and the mortgage an incident.

'The mortgagee is the legal owner for only one purpose, while, at the same time, the mortgagor is the owner for every other purpose and against every other person. The title of the mortgagee is anomalous, and exists only between him and the mortgagor and for a limited purpose. Delano v. Bennett, 90 Ill. 533, was an action of ejectment. E. T. Warren, the owner of two-fifths of the land in controversy, mortgaged the same to the Kennebeck Bank of Maine. The bank conveyed said two-fifths to Benjamin Wales and others, and Delano claimed the same through mesne conveyances from the grantee of the bank. It was held that the deed from the bank purporting to convey thistwo-fifths interest did not convey anything, and the court said (page 536): 'The mortgage is deemed a mere incident to the mortgage in the land without an assignment of the debt is considered in law as a nullity.' The title is never out of the mortgagor, except as between him and the mortgagee and as an incident of the mortgage debt, for the purpose of obtaining satisfaction. When the debt is barred by the Statute of Limitations the title of the mortgagee or trustee ceases at law as well as in equity. When the debt, the principal thing, is gone, the incident, the mortgage, is also gone. (Pollock v. Maison, 41 Ill. 516.) The mortgagor's title is then freed from the title of the mortgagee, and he is the owner of the premises, not by any new title, but by the title which he always had. Statutes of Limitation do not transfer title from one to another, and a statute of limitations which would have the effect of transferring the legal title back from the mortgagee to the mortgagor would be unconstitutional. (Newland v. Marsh, 19 Ill. 376). The title of the mortgagor becomes perfect because the title of the mortgagee is measured by the existence of the mortgage debt or obligation and terminates with it. Barrett v. Hinckley, supra."

In the case of Markus v. Chicago Title and Trust Co. 373 Ill. 557, the court said: "It is, on the other hand, conceded

that where the debt is paid or barred by the Statute of Limitations, a mortgage being but incident to the debt, is no longer a lien on the property".

It is also contended by appellant that Section 11(b) of the Limitations Act provides that the lien of a recorded trust deed shall continue for twenty years after the debt it secures becomes due. We are of the view that this section has no applications to the problem under consideration. The sole purpose of this section is to provide a twenty year limitations for the enforceability of unrecorded extensions. Pertaining to this subject the Court in the case of McCarthy v. Lowenthal, 327 Ill. App. 166, had this to say: "(2) Under the Kraft v. Holzmann case, the lien of the trust deed, etc., was kept alive as long as the indebtedness secured thereby was continued in force, without the necessity of any recording of the extension agreement. The purpose of Section 11 (b) is to set a limit beyond which unrecorded extensions do not have that effect. If a mortgagee sees fit to extend the date of payment of the indebtedness, he may do so without prejudice to his lien and without recording the extension agreement for twenty years after the due date of the mortgage by its terms or on its face was due. If he wishes to preserve his lien thereafter, however, he must see to it that the extension agreement or affidavit as provided in Section 11(b) is recorded.

"(3,4) We see no repugnancy between these sections and, accordingly, we hold that Section 11(b) did not repeal Section 11. The action filed in this case came within the limitation of Section 11 and we believe the decree was proper. It is affirmed."

In view of the foregoing, we are of the opinion that decree entered herein should be affirmed.

DECREE AFFIRMED

44440

PAYSOFF TINKOFF, Appellant, v. HON. FRANK M. PADDEN, etc., Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order striking his amended complaint and dismissing his action against defendant, a duly elected and qualified judge of the Superior court of Cook county, for damages arising from the alleged wilful, malicious and corrupt misconduct of defendant resulting in the dismissal of several actions at law and in equity brought by plaintiff in the Superior court of Cook county.

The jurisdiction of the Superior court of the several causes of action is not questioned. Defendant as a judge of the court was empowered and authorized to enter orders in and determine each of said causes of action unless disqualified for some reason personal to him. The alleged disqualification stated in the complaint is, "a personal ill-will, hatred, hostility and bias and prejudice against the plaintiff," and that defendant was named with other judges in a petition for change of venue from such judges properly filed by plaintiff. The defendant's disqualification, if any, to sit in the cases instituted by plaintiff was a matter to be determined by defendant as a judge sitting in a court having jurisdiction of the subject matter of and the parties to the litigation. The universal rule is that in such circumstances the judge is not liable for his actions in a civil suit for damages, even though he act maliciously and corruptly.

People ex rel. Chicago Bar Ass'n. v. Standidge, 333 Ill. 361; Bradley v. Fisher, 80 U. S. 335.

The judgment is affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.

43867

HARRY Y. VICTOR et al., Appellants,	)	APPEAL FROM SUPERIOR
v.	)	COURT, COOK COUNTY.
HERBERT HILLEBRECHT et al., Appellees.	)	

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Pursuant to a reorganization plan approved in a proceeding instituted under section 77B of the Bankruptcy Act (11 U.S.C.A., sec. 207), a liquidation trust agreement was executed on November 6, 1935 as to the property located at 7000 South Shore Drive, Chicago, Illinois, which premises are improved with a 16 story apartment hotel building, containing 31 unfurnished apartments and 148 furnished apartments. Under said agreement the Trust Company of Chicago was named liquidation trustee and Herbert Hillebrecht, Walter A. Wade and James V. Brenner were named as trust managers.

This suit was instituted as a representative proceeding by several owners of beneficial units of the trust to compel the trust managers and the liquidation trustee to submit an offer of purchase of the trust property to the beneficiaries, to liquidate the trust estate and to distribute its assets. The complaint also asked that certain beneficial units purchased by Hillebrecht, one of the trust managers, after he had assumed his trust duties, be decreed to be trust property upon his reimbursement for his outlays in purchasing such beneficial units.

The cause was submitted on the complaint and answer and after evidence and argument were heard by the chancellor

he entered a decree dismissing the complaint for want of equity. Plaintiffs appeal. There is no question raised on the pleadings.

The trust was to continue for a term of 15 years, expiring July 1, 1950, but was subject to prior termination by the liquidation of the trust property. The purpose of the trust as stated in Section 2 of Article II of the trust agreement was "to liquidate the Trust Property" and convert same into cash and to that "end" and "purpose" the liquidation trustee and the trust managers were directed to "endeavor to make sale or other disposition of the Trust Property as soon as in the opinion of Trust Managers it can be done advantageously and to distribute the proceeds of such sale and disposition to and among the holders of Participation Certificates."

Section 2 of Article XIV of the trust agreement provides as follows:

"It is the intent hereof that Trust Managers shall by written directions to Liquidation Trustee liquidate Trust Property and in the interim supervise the management, operation, improvement, protection and maintenance thereof, all as Trust Managers in their judgment may deem advantageous to the holders of Participation Certificates issued hereunder."

In Section 3 of Article III of said agreement it is provided that no sale of the trust property may be made unless the liquidation trustee "shall first give notice to the holders of Participation Certificates then outstanding, briefly describing the property and the terms and conditions

of the proposed sale", and that, "if within 20 days after the giving of such notice holders of Participation Certificates representing 33-1/3 per cent or more of the then outstanding Trust Units shall file with Liquidation Trustee written dissents from such proposed sale," the "Liquidation Trustee shall not consummate such proposed sale."

At the time the trust was created, one trust unit was given to bondholders in exchange for each $100 of the principal amount of bonds they owned. While acting as trust managers Hillebrecht and Wade purchased beneficial interests in the trust through the agency of Greenebaum Investment Co., a brokerage house, which maintained an active market for such interests. In addition to 35 trust units received by Hillebrecht in exchange for $3500 in bonds which he owned when the trust was created, he purchased from time to time, commencing during the summer of 1936, various blocks of units at prices ranging from $19 to $51.50 per unit, so that at the time of the trial he owned 1480 units or more than one-tenth of the 14,439 outstanding trust units. He purchased for his brother, his sister and his mother an aggregate of 138 units. Wade purchased 50 trust units, for which he paid $51.50 per unit, and he purchased additional trust units for members of his family.

In 1943 the trust managers received offer of $450,000 and $550,000 for the trust property and in January, 1946 they received an offer of $750,000. All of these offers were regarded by the trust managers as insufficient and they were not submitted to the beneficiaries for their

consideration. On February 11, 1946, which was more than ten years after the trust had been created, the trust managers received an offer of $850,000 for the trust property, which they also refused. However, having had an appraisal made which showed the value of the property to be $850,000, the trust managers wrote a letter to the liquidation trustee on February 15, 1946, which contained the following paragraph:

> "The Trust Managers have concluded that they will advise the owners and holders of certificates of beneficial interest of Mr. Meier's offer [$850,000] and certain other facts which they consider relevant. They will not recommend to the owners and holders of certificates of beneficial interest the acceptance of the Meier proposal."

Plaintiffs' complaint alleged inter alia that the trust managers intended to mail a communication to the owners of the beneficial interests recommending that the $850,000 offer be rejected and that they had no authority to make any such recommendation. By way of relief in this regard the complaint asked that the trust managers be restrained from mailing any communication to the beneficiaries in connection with the submittal of said offer without the approval of the court and that "the court may approve the form of the communication and direct the defendants to mail such communication to the unit holders pertaining to the sale of the premises."

The trust managers in their answer admitted in effect that they intended to mail a communication to the certificate holders recommending the disapproval of the $850,000 offer.

When cross-examined by plaintiffs' counsel under section 60 of the Civil Practice Act, Hillebrecht was

asked the following question and he made the following answer:

"Q. Now, then the offer of $850,000 was made to the trustees, the trustees instructed the Trust Company of Chicago to submit an offer but the trustees stated that they would recommend that the trust certificate holders shall dissent from the sale; is that correct?

"A. That is right; that is the way it was left."

Later in his testimony, upon interrogation by the trial judge and defendants' attorney, he stated that the trust managers had decided, before they sent their letter of February 15, 1946 to the liquidation trustee, to submit the offer of $850,000 to the certificate holders without any recommendation.

The complaint charged that only one of the trust managers, Hillebrecht, acquired beneficial interests in the trust and that he had purchased one-third of the outstanding interests. When the proof showed that Hillebrecht acquired approximately one-tenth of the beneficial interests after he became trust manager, that members of his family acquired additional trust units and that Wade had also acquired beneficial interests after he became trust manager, plaintiffs presented to the trial court an amendment to the complaint, which they claimed conformed the complaint to the proof. The court denied leave to file the tendered amendment but defendants' counsel agreed that "no point would be urged upon appeal that the allegations of the complaint did not conform to the proof."

Plaintiffs contend (1) that "the Trust Managers and the Liquidation Trustee were in duty bound to submit the offer to the beneficiaries without any attempt on their

part to influence the beneficiaries whether or not to dissent and the Chancellor clearly erred when he denied such relief"; (2) that "the Trust Managers having consented to submit the offer without any recommendation, it was the duty of the court to grant the relief"; and (3) that "trustees must be impartial and have no right to take sides by creating a clash among the beneficiaries of the trust."

Defendants assert in effect that, because Hillebrecht changed his testimony and stated that the trust managers had decided, before they sent the letter to the liquidation trustee, to submit the offer without any recommendation, the chancellor properly refused to interfere with the trust managers, even to the extent of directing them to secure the court's approval of the communication they proposed to send to the beneficiaries with the submission of the offer.

As we understand defendants' position in this regard, it seems to be that, when Hillebrecht's testimony that the trust managers had decided before they sent their letter of February 15, 1946 to the liquidation trustee to submit the $850,000 offer to the beneficiaries without any recommendation is considered in connection with the statements contained in said letter, it can only be reasonably concluded that the trust managers never intended to do otherwise than to submit the offer without any recommendation. The position of the trust managers in this respect is a complete departure from their position not only from the inception of this litigation but from the time they wrote the letter, heretofore set forth, to the liquidation trustee, two weeks before this suit was commenced. Plaintiffs construed this letter as

an indication by the trust managers of their intention to recommend to the beneficiaries "not to sell" and the complaint alleged that such was the intention of the trust managers. That plaintiffs were warranted in so interpreting the letter is demonstrated by the fact that the trust managers placed the same interpretation upon it in their sworn answer. Furthermore, defendants' counsel in his opening statement at the trial asserted that "the trust managers did intend to finally submit that offer to the certificate holders but would recommend to them that it be not accepted" and Hillebrecht testified shortly after said opening statement was made that when the direction was given to the liquidation trustee to submit the offer of $850,000 to the holders of certificates of beneficial interest, the trust managers stated that they would recommend that the beneficiaries "shall dissent from the sale." In view of Hillebrecht's original testimony, the position of the trust managers both prior and subsequent to the time they sent the foregoing letter to the liquidation trustee as to their right to recommend the rejection of the offer and the theory of defendants' counsel at the time of the trial to the same effect, it is readily apparent that, when Hillebrecht testified that the trust managers had decided, even before they sent the letter to the liquidation trustee, to submit the offer without any recommendation, such testimony was unworthy of belief and should have been entirely disregarded. This belated testimony of Hillebrecht was directly contrary to his prior positive testimony that the trust managers intended to recommend to the beneficiaries the rejection of the offer. He couldn't possibly have been confused or honestly mistaken when he

changed his testimony and the record discloses that even his own attorney was surprised at such change. The only possible explanation for the sudden switch in Hillebrecht's testimony is that he finally realized that the trust managers had assumed an untenable position by claiming that they had the right to recommend the rejection of the offer and he thereby sought to extricate them from such position.

It has been repeatedly held that under a trust agreement creating a liquidation trust, such as that involved herein, the trust managers must include in the notice to the beneficiaries of an offer to purchase the trust property an impartial statement of the relevant facts pertaining to the property and its condition and the terms and conditions of the offer, that such notice must not include mere conclusions of the trust managers as to the advisability or inadvisability of accepting the offer, that the offer must be submitted without any attempt on the part of the trust managers to influence the beneficiaries for or against its acceptance, except as they might be influenced by the relevant facts, and that it is for the beneficiaries to draw their own conclusions from such facts as to whether the offer should be approved or disapproved. (Shapiro v. Chicago Title & Trust Co., 328 Ill. App. 650; Gaver v. Gaver, 176 Md. 171, 4 A. (2nd) 132, 138; Adams v. Cowen, 177 U.S. 471, 483.) To hold otherwise would defeat the very purpose and intent of the trust agreement to allow the beneficiaries to make their own decision on the acceptance or rejection of an offer, uninfluenced by the desires of the trust managers.

That the trust managers still do not intend to restrict

their communication to the beneficiaries to a statement of the relevant facts in connection with the property and the offer, unless they are compelled to do so, is clearly demonstrated by the suggestion in defendants' brief that the trust managers "would probably advise the beneficiaries" that "possibly a much greater price would be in prospect" if and when the OPA rent regulations "ended." At the time the offer was made and at the time this case was tried, it was a matter of pure speculation as to when the rent regulations would be abrogated and, if they were, there were many other unpredictable factors which might well affect the price procurable for the property, notwithstanding the removal of the ceiling on rents.

The principal purpose of this suit was to restrain the trust managers from wrongfully attempting to influence the certificate holders to vote to reject the $850,000 offer and to compel them to submit the offer without any recommendation. The trust managers were strongly opposed to the acceptance of the offer. The only reason they condescended to submit it at all to the beneficaries was because they knew that they would have been derelict in their duty as trustees, if they failed to submit it, after having procured an appraisal themselves from the Chicago Real Estate Board showing that the value of the property was $850,000.

Plaintiffs, having been compelled to seek the aid of a court of equity to frustrate the wrongful intention of the trust managers to recommend the rejection of the offer, certainly should not have been denied the relief sought in this regard, after they had established their right to it.

Closely related to the opposition of the trust managers to the $850,000 offer is the ownership by Hillebrecht and Wade and members of their families of more than one-tenth of the outstanding beneficial units of the trust.

Plaintiffs insist that the trust managers violated their duty as trustees by purchasing beneficial interests in the trust, because by so doing they placed themselves in a competing position as to the beneficiaries generally and one that might well be adverse to them.

Defendants' position in this regard is (1) that "the trust managers had a right to purchase units of beneficial interest for themselves;" (2) that "if there was impropriety in any purchase of a certificate, the seller is the only one who can complain" and (3) that "the ownership of units of beneficial interest creates no interest in the trust managers adverse to the interests of the beneficiaries generally."

Since no case in this or any other jurisdiction has been called to our attention by counsel for either side, wherein the precise questions presented here have been determined, such questions must be considered in the light of fundamental rules of equity applicable generally to the conduct of trustees.

Article XIV of the trust agreement provides that "trust managers may, but need not, be holders of" participation certificates. The obvious purpose of this provision was to enable the holders of bonds, who were to receive certificates, to qualify as trust managers but the trust instrument did not authorize the trust managers, after they became such, to acquire beneficial interests in the trust.

Counsel for defendants assert that, while it is true that the trust agreement does not expressly authorize the purchase by the trust managers of beneficial units in the trust, it is also true that said agreement does not expressly prohibit their purchase of such units. They further assert that while the trust managers may be considered as trustees for the unit holders as far as the hotel property and its management and operation are concerned, they can in no sense be considered as trustees of the beneficial units or the certificates representing them, since they have absolutely no control over those units or certificates and stand in no fiduciary relationship in respect thereto. It is then urged that the trust units are more closely akin to shares of stock in a corporation than to the interest of a beneficiary under an ordinary trust created by will or inter vivos agreement and that the rules applicable to purchases by trustees from beneficiaries do not apply. In support of their position in this respect, defendants cite Hooker v. Midland Steel Co., 215 Ill. 444, Bawden v. Taylor, 254 Ill. 464, and Anchor Realty & Investment Co. v. Rafferty, 308 Ill. App. 484. These cases involve the right of directors to purchase the stock of their corporations and hold in effect that, since the business and property of a corporation are entrusted to its officers and they are empowered to act for the whole body of stockholders, they therefore occupy the position of trustees for the stockholders as a body in respect to such business and property and cannot have or acquire any personal or pecuniary interest in conflict with their duty as such trustee; that there is no trust

relationship between a director of a corporation and an individual stockholder with respect to the latter's stock, over which the director has no control whatever; and that, therefore, he may deal with an individual stockholder and purchase his stock practically on the same terms as a stranger. It is the lack of a trust relationship between them that permits directors to purchase the stock of a corporation from its shareholders. The rule enunciated in the foregoing cases is not applicable to an express trust, where the relation of trustee and cestui qui trust exists. The trust instrument in the case at bar expressly provides that "the agreement creates a true trust" (section 3, article II) and another provision of the instrument (section 2, article XIV) charges the trust managers with the specific duty of liquidating the trust property for the benefit of the certificate holders, thereby making them trustees for the individual beneficiaries.

On oral argument defendants cited Donnelly v. Consolidated Investment Corp., 99 F. (2d) 185, as an additional authority on the right of the trust managers to purchase trust units from the beneficiaries of the trust, as distinguished from the purchase of the trust property itself. In our opinion, the Donnelly case is not applicable, because it involved a so-called Massachusetts Trust, which was characterized by the court as "a common form of business organization," likened "for the purposes of taxation *** to corporations, which they much resemble, the trustees being analagous to directors and the shareholders to corporate stockholders."

The distinction between a Massachusetts trust and a liquidation trust appears from the decision in Morrissey v. Commissioner, 296 U. S. 344, where the court, holding that such an organization has the characteristics of a corporation and is therefore distinguished from the ordinary trust, said: "In what are called 'business trusts' the object is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and sharing its gains. Thus a trust may be created as a convenient method by which persons became associated for dealings in real estate, the development of tracts of land, the construction of improvements, and the purchase, management and sale of properties; or for dealings in securities or other personal property, or for the production, or manufacture, and sale of commodities; or for commerce, or other sorts of business; where those who become beneficially interested, either by joining in the plan at the outset, or by later participation according to the terms of the arrangement, seek to share the advantages of a union of their interests in the common enterprise." That form of organization bears no resemblance whatever to the liquidation trust here under consideration, the object of which was to dispose of the property "as soon as in the opinion of the trust managers it can be done advantageously" and to distribute the assets among the beneficiaries.

Defendants insist that if there was impropriety in any purchase of a certificate, the seller is the only one who can complain. They readily admit that a trustee cannot purchase in his own name and for his own benefit an outstanding judgment lien, squatter's right in the trust property,

etc., and that, if he does so, the trust is entitled to the benefit thereof upon reimbursing the trustee for his outlays in connection with such a purchase, but they say that this rule has never been applied to the purchase by a trustee of a beneficial interest from a beneficiary. By specious reasoning defendants argue that since the trustee has the right to purchase for himself the interest of a beneficiary and that such a purchase can be set aside only for fraud, "it seems to us axiomatic that the only one who can complain of the fraud is the person defrauded." There is no force to this argument in view of the obvious fact that the rights of the holders of trust units who did not sell same to Hillebrecht and Wade, were also affected by the conduct of the trust managers, as will be hereinafter shown. The cases cited by defendants, which hold that conveyances in fraud of creditors can be set aside only by creditors who are defrauded, are not applicable. The question as to whether the trust managers were guilty of fraud as to the holders of trust units, who sold them to Hillebrecht and Wade, is of no consequence in this proceeding. The question here concerns rather the propriety of the purchase by the trust managers of beneficial interests in a trust, which was created for the benefit and advantage of the beneficiaries generally, in whom was vested the right to accept or reject an offer to purchase the trust property upon its submission to them by the trust managers.

This brings us to the consideration of defendants' contention that "the ownership of units of beneficial

interest creates no interest in the trust managers adverse to the interests of the beneficiaries generally."

That the trust managers were unwilling to sell the property at any reasonable price at the time they received the $850,000 offer appears from the allegation in the complaint, which was not denied, that said offer was made without any privilege to the offeror, who was willing, in the event that offer was approved by the certificate holders, that higher bids might be received and the property sold to the highest bidder for cash. Although he read the form of the offer, Hillebrecht testified that he did "not know that in the offer of $850,000 we [the trust managers] had the right to receive higher bids," and then added that "if there was a price of $850,000 submitted without any condition, just to find out how the bondholders felt, the trust managers would not even want to submit it at any price at this time, even though we would not be bound on their approval to sell." This testimony indicates the determined opposition of the trust managers not only to the $850,000 offer but to any higher offer that might have been made at that time and it affords a reasonable explanation for such opposition and for the willingness of Hillebrecht and Wade to invest upwards of $40,000 of their own funds in acquiring large blocks of trust certificates. If permitted to continue their acquisition of trust units, they could purchase enough certificates themselves or in combination with others to attain sufficient voting strength to block any bid made and thus defeat the wishes of the holders of as many as two-thirds of the trust units who might desire to sell the

property, until such time as the trust managers considered it advantageous to themselves to liquidate the trust.

It would be naive, indeed, to ascribe to Hillebrecht and his cotrustee the altruism they claim in purchasing these certificates - to prevent others from acquiring control. Their conduct can be interpreted only as a course of speculation in securities of the trust for their own advantage and, when they embarked on such a course, they did so to create for themselves an interest in the trust, which was patently adverse to the interests of the beneficiaries generally, many of whom undoubtedly desired that the trust property be sold at a fair price and at a relatively early date. Furthermore, by voting his trust units against the $850,000 offer, as he testified he would, Hillebrecht would necessarily compete with the beneficiaries who favored the acceptance of such an offer.

The fact that the trust managers had not acquired the one-third interest in the trust necessary to block any offer that might be submitted for the purchase of the trust property is not of crucial importance, because their ownership of more than one-tenth of the trust units could easily lead to the formation of a group strong enough to reject any offer made, however, advantageous it might be considered by the remaining certificate holders.

Even though it be assumed that the trust managers did not stand in a fiduciary relationship in respect to the trust units when they purchased them, their ownership of same gave them a substantial interest in the trust, which might readily tempt them to neglect the interests of the

beneficiaries generally.

In this state the fundamental duty of a trustee is defined in Thorp v. McCullum, 6 Ill. 614, one of the earliest decisions of our Supreme Court, from which we quoted as follows in People ex rel. v. Central Republic Trust Co., 300 Ill. App. 297: "The temptation of self interest is too powerful and insinuating to be trusted. Man cannot serve two masters; he will foresake the one and cleave to the other. Between two conflicting interests, it is easy to foresee, and all experience has shown, whose interests will be neglected and sacrificed. The temptation to neglect the interest of those thus confided must be removed by taking away the right to hold, however fair the purchase, or full the consideration paid; for it would be impossible, in many cases, to ferret out the secret knowledge of facts and advantages of the purchaser, known to the trustee or others acting in the like character. The best and only safe antidote is in the extraction of the sting; by denying the right to hold, the temptation and power to do wrong is destroyed."

That Illinois courts have steadfastly adhered to the principle enunciated in the Thorp case is shown in Bennett v. Weber, 323 Ill. 283, wherein the court said that "early in the history of the State, it was laid down as a general principle of equity that a trustee cannot deal on his own account with the thing or the person falling within the trust; *** a trustee is not permitted to place himself in a position where it will be difficult for him to be honest and faithful to his trust." In the early case of Michaud v. Girod, 4 Howard 503, 11 L. Ed. 1076, the court said: "There

is no blinking the fact that the ground on which the court denounces as a fraud the purchase by a trustee of trust property is that it inevitably brings about a conflict of interest between himself personally and the beneficiaries of his trust; or at least incites a motive, or affords opportunity for a motive, on the part of the trustee to take advantage of his superior knowledge acquired in his trust capacity, which may induce him to conceal his information from the beneficiaries or not to employ it exclusively for their benefit while they are relying on him scrupulously to devote himself to the furtherance of their welfare."

In Wootten v. Wootten, 151 F. (2) 147, the court said (p. 150): "A trustee must not compete with his beneficiary in the acquisition of property. The principle is not limited to cases where the fiduciary acquires property entrusted to him, nor to cases where the fiduciary competes with the beneficiary in the purchase of property which the trustee has undertaken to purchase for the beneficiary. Even though the interest purchased by the fiduciary for himself is not property of the beneficiary entrusted to the fiduciary, nor property which the fiduciary has undertaken to purchase for the beneficiary, the principle applies if the property purchased by the fiduciary for himself is so connected with the trust property or the scope of his duties as fiduciary, that it is improper for him to purchase it for himself." (Italics ours.)

The following often-quoted excerpt from the opinion in Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545, written by Mr. Justice Cardozo, may well be used as a standard for the scrupulous conduct required of a trustee: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. (Wendt v. Fischer, 243 N. Y. 439, 444.) Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

In York v. Guaranty Trust Co., 143 F. 2d 503, the court emphasized the fact that a trustee owes his beneficiaries undivided loyalty, "entirely untinged by considerations of any important benefits to himself *** and one whose edge cannot be dulled by frequent use," and quoted with approval an excerpt from Bayer v. Beran, N. Y. L. J. April 20, 1944, wherein Mr. Justice Shientag said: "While there is a high moral purpose implicit in this transcendent fiduciary principle of undivided loyalty, it has back of it a profound understanding of human nature and of its frailties. It actually accomplishes a practical beneficient

purpose. It tends to prevent a clouded conception of fidelity that blurs the vision. It preserves the free exercise of judgment uncontaminated by the dross of divided allegiance of self-interest. It prevents the operation of an influence that may be indirect but that is all the more potent for that reason.

Professor Bogert in his work on Trusts and Trustees, volume 3, section 484, summarizes the rule as follows: "One of the cardinal principles in the law of fiduciary relationships is the rule that the fiduciary must be absolutely loyal to his beneficiary or principal and that he must exclude all selfish interest in his dealings ***." The principles enunciated in these and other authorities that might be cited, have been generally followed and the courts invariably emphasize that it is only by rigid adherence to them that all temptation can be removed from a fiduciary to serve his own interest when it is in conflict with the obligations of his trust.

Considering the conduct of the trust managers in the light of the foregoing principles of equity, we are impelled to hold that their course of dealing was utterly inconsistent with their duties as trustees. Accordingly, they should be relieved of their positions as trust managers and others appointed in their stead, in whom the beneficiaries may have the utmost confidence; and in view of our conclusion that the trust units purchased by the trust managers constituted adverse and competing interests, so far as the sale of the trust property is concerned, Hillebrecht and Wade should be required to hold the certificates representing such trust

units subject to the trust, if the cestuis qui trustents so demand and tender the price which said trust managers paid for such certificates. (Rankin v. Bancroft & Co., 114 Ill. 441; Bogert on Trusts and Trustees, vol. 3, sec. 485; Wootten v. Wootten, 151 F. (2) 147.)

For the reasons stated herein the decree of the Superior Court of Cook County is reversed and the cause remanded with directions that a decree be entered in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

44272

R. L. FELTINTON, assignee of JOHN W. F. SMITH, successor receiver of the Chicago Bank of Commerce, Appellee,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
JOSEPHINE RONGETTI, Appellant.	)	

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a scire facias proceeding instituted in the Municipal Court of Chicago to revive a judgment by confession for $1857.50, entered in said court on September 21, 1933. The defendant, Josephine Rongetti, was personally served with summons in the revival proceeding within apt time but, having failed to appear on the return day, March 24, 1947, she was defaulted for want of appearance and a judgment was entered on said date reviving the judgment by confession as of the date of its rendition. On July 9, 1947, which was more than 100 days after the judgment was entered in the revival proceeding, defendant filed and presented a motion, supported by her verified petition, to vacate said judgment and for leave to appear and defend against plaintiff's claim for the revival of the judgment by confession. The trial court entered an order denying defendant's motion to vacate and she appeals from said order.

Defendant's petition to vacate alleged in substance that on September 21, 1933, Alfred K. Foreman, receiver of the Chicago Bank of Commerce, procured a judgment by confession for $1857.50 against her; that said judgment by confession was entered upon a promissory note for $1500,

dated June 24, 1931, which note was secured by a trust deed conveying two unimproved lots to the Union Bank of Chicago, as trustee; that said note purports to bear the signature of defendant as the maker thereof but that such signature "is not that of defendant but is a forgery", as is her purported signature on the trust deed; that "knowledge that the signature on said promissory note is a forgery came to your petitioner within the past two weeks, and your petitioner thereupon secured the services of her present counsel to prepare and present her petition herein"; and that "execution upon the aforesaid judgment by confession was issued on September 26, 1933, but was never served on petitioner, and was returned no part satisfied on December 26, 1933."

The petition to vacate then alleged that the judgment by confession was assigned by John W. F. Smith, successor receiver of the Chicago Bank of Commerce, to R. L. Feltinton on February 4, 1947 and that such assignment was filed herein on March 11, 1947; that "said assignment is upon its face invalid, it not running from the original plaintiff herein, nor showing any authority in John W. F. Smith, the purported assignor, to make said assignment"; and that on March 12, 1947, R. L. Feltinton, as assignee of John W. F. Smith, successor receiver of the Chicago Bank of Commerce, instituted this proceeding against defendant to revive the judgment by confession for $1857.50.

It was further alleged that "summons in said proceedings issued on March 12, 1947, returnable March 24, 1947, and was served upon defendant therein on March 20, 1947";

that "on said March 24, 1947, defendant was defaulted, and judgment was entered herein against your petitioner as defendant for $1857.50, with interest thereon from September 21, 1933, and costs of both proceedings"; and that "upon being served with summons in said revival proceedings, your petitioner consulted Harry J. Rosenzweig, an attorney, to look into the matter and advise her."

The petition to vacate then set forth in considerable detail defendant's explanation of her failure to appear and defend against plaintiff's claim for the revival of the judgment and of her delay in filing said petition to vacate and such explanation concluded with the averment that on June 9, 1947, or shortly thereafter, Attorney Harry J. Rosenzweig "escorted her to the office of the clerk of the Municipal Court of Chicago, where Mr. Rosenzweig obtained the files in this cause and exhibited to her the photostat of said mortgage note therein appearing as an exhibit, and thus for the first time [she] saw the signature purportedly hers thereon appearing as maker of said note, and noted that said signature was not her genuine signature but was a forgery."

Defendant's petition prayed that the judgment of revival be vacated and that she be granted leave to appear and defend against plaintiff's statement of claim filed in the revival proceeding.

Defendant contends that "a judgment by confession against a defendant, based on a forgery, is unauthorized and a nullity" and "may not be revived." This contention is

misleading and it does not contain a correct statement of the law applicable to this case.

Plaintiff having filed no answer to defendant's petition to vacate, all of the well pleaded material facts set forth therein must be taken as true in considering said petition and the relief sought therein.

If an attack is made on a judgment by confession itself on the ground that it is based on a note that is admittedly forged, the law is settled that such a judgment is a nullity and may be set aside on motion, because of the court's lack of jurisdiction to enter it. (Handley v. Wilson, 242 Ill. App. 66.) But an entirely different situation is presented here. Although the validity of the judgment by confession had not been challenged on any ground prior to the entry of the revival judgment, it is asserted in effect that defendant has the right to challenge its validity indirectly by her motion to vacate the revival judgment by showing that her signature was forged to the note. In our opinion, she has no such right. In defendant's brief her motion to vacate the revival judgment is treated as if the relief sought by said motion was to set aside the judgment by confession but it cannot be so treated.

The law applicable to the defenses available in a proceeding to revive a judgment is clearly stated in Bank of Eau claire v. Reed, 232 Ill. 238. There the court said at p. 240:

"The only question to be determined in a proceeding by scire facias to revive a judgment is whether the plaintiff has a right, as against the defendant, to have the judgment executed. That rule was stated in Smith v. Stevens, 133 Ill. 183, and in connection with the rule the court quoted from Dowling v. McGregor, 91 Pa. St. 410, as follows: 'The only defense

in the trial of the scire facias on a judgment is a denial of the existence of the judgment or proof of a subsequent satisfaction or discharge thereof.' The defenses available, and which go to the plaintiff's right, as against the defendant, to have the judgment executed, are, that there is no such record, or that the judgment has been paid or released, or there has been an accord and satisfaction. The defendant, under the plea of nul tiel record, may show the judgment to be void for want of jurisdiction, if that fact appears from an inspection of the record, but he cannot attack it collaterally by contradicting the record. (23 Cyc. 1457.) A plea to a writ of scire facias to revive a judgment denying service of process is a collateral attack on the judgment, and the defendant is not entitled to make such an attack by evidence aliunde against a record which shows valid service."

It will be noted that the petition to vacate did not allege any of the defenses enumerated in the Reed case, which are available to a defendant in a proceeding by scire facias to revive a judgment. While, under the law as stated in the Reed case, the defendant might show that the judgment sought to be revived herein was void for want of jurisdiction, if that fact appears from an inspection of the record, she is not entitled to make a collateral attack on the judgment by confession by evidence aliunde showing that her signature was forged on the note upon which it was confessed, as against the record showing a valid warrant of attorney to confess judgment.

In our opinion, a judgment by confession may be revived the same as any other ordinary judgment. An inspection of the record shows that a verified statement of claim was filed in the Municipal Court of Chicago by the receiver of the Chicago Bank of Commerce against Josephine Rongetti on September 21, 1933. Appended thereto is an affidavit both as to the execution of the note and as to plaintiff's claim. This affidavit was made and verified by one Howard D. Moses as

the duly authorized agent of the receiver of the Chicago Bank of Commerce. It stated in part that "the signature to said promissory note and power of attorney thereto attached is the genuine signature of said defendant; that said promissory note was duly executed by said defendant." Attached to the statement of claim is a cognovit signed by Thomas S. Hogan, as defendant's attorney, admitting plaintiff's right to recover on the note and an order signed by Judge Bonelli of the Municipal Court of Chicago, dated September 21, 1933, that judgment be entered for the plaintiff and against the defendant for $1857.50 and costs and execution to issue therefor. A copy of the promissory note purporting to be signed by Josephine Rongetti is also attached to the statement of claim. At the bottom of said note is the legend:

"This principal note has been identified with the trust deed securing it under Register No.....

Union Bank of Chicago as Trustee
By O. G. Nardi
Secretary."

It appears from the foregoing record of the judgment by confession that said judgment was not void on its face for want of jurisdiction of defendant's person and, as held in the Reed case, she cannot attack it collaterally by contradicting said record.

While it must be considered as true, as alleged by defendant, that she had no knowledge of the existence of the judgment by confession until more than 13 years after its entry and that it was therefore impossible for her to challenge its validity during said period, it is also true that if she and her agent, her then attorney, had exercised even the

slightest diligence, they could have learned of its existence on March 20, 1947, when defendant was served with summons in the revival proceeding. It was not too late then to have the judgment by confession set aside upon motion, if it was void, as defendant now claims, since a void judgment may be vacated at any time and the revival proceeding could have been stayed, if necessary, until there was a final determination on the motion challenging said judgment by confession as being void for want of jurisdiction.

Defendant also contends that "plaintiff's statement of claim shows on its face that he is not entitled to recover as assignee of the judgment by confession, where the assignment does not run from the original plaintiff and where neither the assignment nor statement of claim alleges any authority in the receiver to sell and assign the judgment."

Section 22 of the Civil Practice Act (par. 146, chap. 110, Ill. Rev. Stat. 1947) provides in part as follows:

> "The assignee and owner of a nonnegotiable chose in action may sue thereon in his own name, and he shall in his pleading on oath, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title; * * *."

The verified statement of claim in the revival proceeding alleged in part that "R. L. Feltinton is the actual bona fide owner of the within judgment having acquired title thereto by a written assignment thereof from John W. F. Smith as successor receiver of Chicago Bank of Commerce, dated February 4, 1947, which assignment was duly filed with the Clerk of the Municipal Court of Chicago on March 11, 1947."

These allegations, in our opinion, are sufficient to comply with section 22 of the Civil Practice Act. In any

event, if defendant desired to contest the validity of the assignment or the authority of the assignor to make same, it was incumbent upon her to comply with section 35 (2) of the Civil Practice Act (par. 159, chap. 110, Ill. Rev. Stat. 1947) prior to the entry of the revival judgment, which section is in part as follows:

> "The allegation of the execution or assignment of any instrument in writing shall be deemed to be admitted unless denied by a pleading verified by oath, unless such verification is excused by the court."

Defendant, having been served with summons in the revival proceeding within apt time and having failed to comply with section 35 (2) of the Civil Practice Act prior to the entry of the revival judgment, must be held to have admitted the propriety of the assignment of the judgment by confession of September 21, 1933 to R. L. Feltinton, the plaintiff herein.

Defendant's petition to vacate shows on its face that she was guilty of gross negligence in failing to file her appearance in the revival proceeding. It will be recalled that she was personally served with summons in said proceeding on March 20, 1947, same being returnable on March 24, 1947, and that on the day she received the summons she took it and a copy of plaintiff's statement of claim, which was attached thereto, to her then attorney. Said statement of claim did not aver that the judgment sought to be revived was had by confession on a note but it did refer to the case in which said judgment was entered by its Municipal court number. The attorney told her at that time that he would look into the matter and advise her.

Instead of examining the Municipal court files on March 20, 1947, as he should have done, to ascertain the identity of the note upon which the judgment was confessed, the attorney, according to the petition to vacate, embarked on a rather protracted investigation, in which he was later aided by defendant, to ascertain the identity of the note. When this wholly unnecessary investigation was concluded on June 9, 1947, which was more than 70 days after the revival judgment had been entered, defendant again went to see the same attorney, who took her to the office of the clerk of the Municipal court, where the files containing a photostatic copy of the note were examined. She claims that she then discovered for the first time that her purported signature on said note was a forgery. The files of the Municipal Court in the case in which the judgment by confession was entered, including the photostatic copy of the note, were just as accessible to defendant and as readily available to her for examination on March 20, 1947, when she was served with summons in the revival proceeding and turned same over to her attorney, as they were on June 9, 1947. It clearly appears from the facts alleged in defendant's petition to vacate that she and her agent, her then attorney, were completely lacking in diligence in permitting the revival judgment to be entered by default for want of her appearance.

For the reasons stated herein the order of the Municipal court of Chicago denying defendant's motion to vacate the revival judgment was properly entered and it should be and is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

44399

PAUL COZZI,
Appellee,

v.

JOSEPH PIZZO,
Defendant below.

SAMUEL A. GILFORD et al.,
Garnishees below.

On Appeal of SAMUEL A. GILFORD,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Paul Cozzi procured a judgment by confession against Joseph Pizzo for $821.32 and costs. An action in garnishment was brought by Pizzo for the use of Cozzi against Samuel A. Gilford and Carl Campise. The garnishment proceeding was tried by the court without a jury and separate judgments were entered against each of the garnishee defendants for $834.42. Gilford appeals from the judgment entered against him. No question is raised on the pleadings. The names of both Joseph Pizzo and Charles Pizzo appear on certain documents produced in evidence as parties thereto but hereinafter for convenience we will refer to Joseph Pizzo only in connection with such documents.

On December 17, 1946 Carl Campise transferred by bill of sale to Joseph Pizzo a tavern known as Club Chesterfield located at 1015 Belmont avenue, Chicago, Illinois. On the same date Pizzo executed a chattel mortgage on the personal property contained in the tavern to Gilford to secure a loan made by him to Pizzo. Thereafter, Campise entered into an arrangement with Pizzo, whereby the former agreed to purchase

the tavern back from the latter. Pursuant to such arrangement Campise and Pizzo went to Gilford's office on April 28, 1947 to consummate the sale of the tavern to Campise. Pizzo was at that time indebted to Cozzi to the extent of $1700, evidenced by judgment notes. Gilford, who was in the real estate and loan business, prepared all of the documents necessary to close the deal. These documents were a bill of sale and a Bulk Sales affidavit as to the vendor's creditors to be executed by Pizzo, a chattel mortgage to Pizzo in the sum of $3920.23 on the personal property contained in the tavern to be executed by Campise and an assignment of said chattel mortgage to Gilford to be executed by Pizzo. Pizzo executed the bill of sale conveying the personal property contained in the tavern to Campise. Campise executed the chattel mortgage on said personal property to Pizzo in the sum of $3920.23. Pizzo executed the assignment of said mortgage to Gilford. Gilford gave his check for $3420.23 to Pizzo as payment for the Campise chattel mortgage. This check for $3420.23 was then endorsed by Pizzo to Gilford in payment of the balance of $3395 due on the chattel mortgage from Pizzo to Gilford, theretofore executed on December 17, 1946. As already stated, Gilford also prepared a Bulk Sales affidavit as to the vendor's creditors to be executed by Pizzo but Cozzi was not included in the creditors listed in said affidavit.

Joseph Pizzo testified that "at the time of the signing of the Bulk Sales affidavit, I notified Mr. Gilford and Carl Campise that there was a balance of $1700 due to Paul Cozzi and that Carl Campise said that he would pay this debt,

and Samuel A. Gilford said that it would not be necessary to include this debt in the Bulk Sales affidavit since this would be a personal transaction" and that "Paul Cozzi had no notice of the sale."

Gilford testified that "on April 28, 1947 at the time of the resale of the Club Chesterfield by Joseph Pizzo to Carl Campise, I prepared and drew up at my office all the papers dealing with the transfer of ownership and sale of the property known as the Club Chesterfield located at 1015 Belmont avenue, Chicago, Illinois"; that "the Bill of Sale and Bulk Sales affidavit were executed at my office on the same day and that the list of creditors shown in the Bulk Sales affidavit were listed in accordance with information furnished by Joseph Pizzo"; that he "did not know at this time [April 28, 1947] that Paul Cozzi was a creditor of Joseph Pizzo"; and that the chattel mortgage from Campise to Pizzo, which was assigned to him (Gilford) on April 28, 1947, was paid in full on August 14, 1947, "when Carl Campise again resold the Club Chesterfield."

Campise testified that "Pizzo did not make any mention of the Paul Cozzi debt" when the deal was closed in Gilford's office and he (Pizzo) signed the Bulk Sales affidavit.

Hereinafter Cozzi will be referred to as plaintiff, the vendor Pizzo as defendant and appellant Gilford as garnishee.

Plaintiff predicates his right to recover from the garnishee solely upon Section 1 of the Bulk Sales Act (par. 78, chap. 121-1/2, Ill. Rev. Stat. 1945), which prior to its amendment, which became effective July 21, 1947, provided

as follows:

"That the sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business shall be fraudulent and void as against the creditors of the said vendor, unless the said vendee shall, in good faith, at least five (5) days before the consummation of such sale, transfer or assignment demand and receive from the vendor a written statement under oath of the vendor or a duly authorized agent of the vendor having knowledge of the facts, containing a full, accurate and complete list of the creditors of the vendor, their addresses and the amounts owing to each as near as may be ascertained and if there be no creditors a written statement under oath to that effect; and unless the said vendee shall at least five days before taking possession of said goods and chattels and at least five days before the payment or delivery of the purchase price, or consideration of [or] any evidence of indebtedness therefor, in good faith, deliver or cause to be delivered or send or cause to be sent personally or by registered letter properly stamped, directed and addressed, a notice in writing to each of the creditors of the vendor named in the said statement or of whom the said vendee shall have knowledge, of the proposed purchase by him of the said goods and chattels and of the price, terms and conditions of such sale * * *."

It is undisputed that the sale involved herein was a bulk sale as defined in the foregoing section of the Bulk Sales Act and it will be noted that the duty of complying with the requirements specified in said section is imposed upon the <u>vendee</u>.

The only real question presented for our determination is whether the Bulk Sales Act is applicable to a chattel mortgage.

We will first consider what occurred in reference to the Bulk Sales affidavit at the time the sale was consummated in the office of the garnishee. It will be recalled that Pizzo, the vendor, testified that when he was signing said affidavit he noticed that plaintiff was omitted from the list of his creditors contained therein and that he then

apprised both the garnishee and the vendee that he was indebted to plaintiff in the sum of $1700. The garnishee and the vendee denied the vendor's testimony in this regard and the garnishee testified further that the list of creditors contained in the affidavit was furnished by the vendor and that plaintiff was not included in said list. However, even though it be assumed that the testimony of the vendor was true, the fact that Cozzi was not included in the list of the vendor's creditors contained in the affidavit could not possibly impose any liability under the Bulk Sales Act upon said garnishee as a chattel mortgagee. If, as plaintiff contends the garnishee was guilty of actual fraud against him in connection with the Bulk Sales Affidavit, it may well be that plaintiff has a right of action against him that may be asserted in some appropriate proceeding but the law is settled in this state that the Bulk Sales Act is not applicable to a mortgagee under a chattel mortgage. Since the Bulk Sales Act is in derogation of the common law and penal in nature, it must be strictly construed. (Coon v. Doss, 361 Ill. 515; In Re George Seton Thompson Co., 297 Fed. 934; Snead Co., Inc. v. Johnson, Inc., 262 Ill. App. 385; McConnell v. Brace-Beluche & Co., 264 Ill. App. 72; and Midland Oil Co., v. Packers Motor Transport, Inc., 277 Ill. App. 451.) Only the persons contemplated by the act and designated therein are subject to its restrictions and are entitled to its benefits. (37 Corpus Juris S., sec. 479, p. 1331.) The only persons within the contemplation of the Bulk Sales Act and designated therein are the vendor and his creditors and the vendee. In In Re George Seton Thompson Co., 297 Fed.

934, decided in 1924, the Circuit Court of Appeals of the Seventh Circuit, in holding that the Bulk Sales Act of Illinois was not applicable to chattel mortgages, said at p. 937:

> "While the question as to whether the transfer by means of a chattel mortgage comes within the provisions of the Bulk Sales Act has not, so far as we are informed, been determined by the Illinois courts, there are such fundamental differences between a conveyance by which a vendor absolutely divests himself of the title to his property and a conveyance by a chattel mortgage which carries with it the right to repay the consideration and cancel the transaction that it seems improbable that, if it had been any part of the legislative intent to include chattel mortgages within the prohibition contained in the act, the Legislature would have included chattel mortgages by name or by some other designation that would have afforded some means of ascertaining such legislative intent."

In Talty v. Schoenholz, 323 Ill. 232, decided in 1926, the court held that the Bulk Sales Act does not apply to chattel mortgages, inasmuch as a chattel mortgage is not a sale or transfer within the meaning of said act, as the relationship of the parties is merely that of debtor and creditor until foreclosure of the mortgage and the possession remains in the mortgagor subject to the mortgagee's lien.

Disregarding the foregoing authorities, plaintiff insists that the Bulk Sales Act is applicable to chattel mortgages and contends that "garnishee defendant Gilford's liability to the plaintiff, Cozzi, is the statutory liability imposed by the Bulk Sales Act." No authority has been or could be cited to support plaintiff's position in this regard. Nevertheless, an extensive argument is made in plaintiff's brief in an attempt to support it. This argument is replete with charges that the garnishee was

guilty of fraudulent conduct in practically every phase of the transaction that had to do with the closing of the deal for the sale of the tavern and that consequently his chattel mortgage was void as to plaintiff. It would serve no useful purpose to discuss these charges in detail, inasmuch as plaintiff's position is summarized as follows at the conclusion of the argument in his brief:

"The garnishee defendant, Samuel A. Gilford, as we have shown, was the vendee of the chattel mortgage, from Carl Campise to Joseph and Charles Pizzo for $3920.23 assigned by said Pizzos to him * * *. This mortgage and the assignment thereof by the Pizzos to the garnishee defendant Gilford were fraudulent and void as to the plaintiff, Paul Cozzi, under the Bulk Sales Act, for failure of the garnishee defendant Gilford to give or cause to be given to the plaintiff and the other creditors of Joseph Pizzo the notice required by the Bulk Sales Act. Garnishee defendant, Samuel A. Gilford, on August 14, 1947, received and converted the proceeds of this fraudulent and void mortgage."

This summary demonstrates beyond question that plaintiff's position is untenable. So far as the record discloses, the chattel mortgage from the vendee to the vendor and the latter's assignment thereof to the garnishee were in all respects valid. It will be noted that the only reason given for the statement in the foregoing summary that said chattel mortgage and the assignment thereof were "fraudulent and void as to the plaintiff, Paul Cozzi, under the Bulk Sales Act" was that the garnishee as chattel mort-

gagee did not give or cause to be given "to the plaintiff and the other creditors of Joseph Pizzo the notice required by the Bulk Sales Act." As already shown, the Bulk Sales Act is not applicable to chattel mortgages and a chattel mortgagee is under no duty to the creditors of the vendor to comply with the requirements of said act. In answer to plaintiff's statement that the garnishee "received and converted the proceeds of this fraudulent and void mortgage", it is sufficient to say that the chattel mortgage was not fraudulent and void and that the garnishee had the right under the law to receive full payment of same.

For the reasons stated herein we are impelled to hold that the trial court erred in entering the judgment appealed from. Therefore, the judgment of the Municipal Court of Chicago against Samuel A. Gilford, as garnishee, must be and it is reversed.

REVERSED.

Friend and Scanlan, JJ., concur.

44582

PEOPLE OF THE STATE OF ILLINOIS, Appellant,

v.

WILBUR WILLIAMS, Appellee.

APPEAL FROM CRIMINAL COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On September 23, 1947 Wilbur Williams filed a motion in the nature of a writ of error coram nobis in the Criminal Court of Cook County under Section 72 of the Civil Practice Act to recall, annul and set aside three judgments of said court under which he was sentenced to the Illinois State Penitentiary. Pursuant to a hearing on defendant's petition filed in support of said motion and the answer thereto of the state's attorney, the trial court entered an order declaring said judgments "to be a nullity, and of no force and effect" and setting aside "all orders entered subsequent thereto." The State appeals from said order. Hereinafter Wilbur Williams will be referred to as the defendant.

It appears from defendant's petition filed in support of his motion and the answer of the state's attorney to said petition that on January 17, 1934 defendant was adjudged to be feeble-minded by one of the judges of the Municipal Court of Chicago and committed to the Dixon State School and Colony for the feeble-minded at Dixon, Illinois; that after a hearing in the Municipal Court of Chicago he was released on parole from said institution on January 28, 1935 without having been judicially restored to reason; that thereafter three indictments were returned against him in the Criminal Court of Cook County charging him with armed robbery; that

when he was tried on such indictments he was represented by counsel; that after a verdict of guilty had been returned upon his trial on indictment No. 76350, he entered a plea of guilty to each of the other indictments, No. 76361 and No. 76363; that judgments were entered in the Criminal Court of Cook County by the Honorable D. J. Normoyle, the trial judge, on said verdict and pleas of guilty and defendant was sentenced on October 2, 1935 to a term of from one year to life in the Illinois State Penitentiary in each case, the sentences to run concurrently; that neither defendant nor his counsel apprised Judge Normoyle either prior to or during the course of any of his three trials that he had theretofore been adjudged to be feeble-minded by the Municipal Court of Chicago on January 17, 1934; that Thomas J. Courtney represented the People of the State of Illinois as state's attorney both at the time of the hearing in the Municipal Court of Chicago on January 17, 1934, when the defendant was adjudged to be feeble-minded, and on October 2, 1935, when he was tried and convicted in the Criminal Court of Cook County on the aforesaid indictments charging him with armed robbery; and that defendant recovered his reason on April 8, 1947. As heretofore shown, defendant instituted this proceeding on September 23, 1947.

The state urges three grounds for reversal, the only one of which we deem it necessary to consider is that "the duty and responsibility of raising the question as to whether a person charged with the commission of a crime is insane rests upon the accused and his counsel."

Defendant's position as stated in his brief is "(1)

that the defendant, once having been adjudicated to be feebleminded by a court of competent jurisdiction, continued to be feeble-minded until such time as he shall have been restored to reason by a court of competent jurisdiction; (2) that not having been restored to reason by a court of competent jurisdiction prior to the trial in causes Nos. 76350, 76361, and 76363, in the Criminal Court of Cook County, Illinois, the court was without jurisdiction to try him in these causes; and (3) that Thomas J. Courtney, having been State's Attorney and having represented the People not only in causes Nos. 76350, 76361, and 76363 in the Criminal Court of Cook County but also in Cause No. 560274 in the Municipal Court of Chicago, Illinois, in which latter case the Petitioner Appellee was adjudged to be feeble-minded, was bound as an officer of the Criminal Court of Cook County, Illinois, to draw to the attention of the Court on Causes Nos. 76350, 76361, and 76363, the fact that Petitioner-Appellee had been adjudged to be feeble-minded, and had not been restored to reason, a fact, which, had it been brought to the attention of the Court would have deprived the Court of jurisdiction to try, convict, and sentence the Petitioner-Appellee in Causes Nos. 76350, 76361, and 76363."

No authority is cited in support of defendant's position. The theory upon which his motion in the nature of a writ of error coram nobis is predicated is unsound and it was so held by the Circuit Court of Appeals for the Seventh Circuit in the recent case of United States ex rel. Lester A. Samman v. Ragen, Warden, 167 Fed. (2d)

543. In that case Samman appealed from the denial of his application for discharge on a writ of habeas corpus. It appears that he was held in custody of the warden of the Illinois State Penitentiary for violation of a parole from a sentence in 1931 for armed robbery following his conviction therefor in 1945. The single question presented by the petition and the appeal was whether the fact that Samman had been adjudicated insane by a California court and committed to an asylum in 1931 and never thereafter legally restored to sanity, ipso facto rendered the subsequent convictions and sentences by the Illinois courts null and void and entitled Samman to release from the warden's custody. Samman was represented by counsel in both criminal proceedings. The fact of his adjudication of insanity was not called to the attention of the trial court at any time during the 1931 proceedings and it was not called to its attention until after a plea of guilty and discharge of the jury in 1945, during the course of a hearing in mitigation, in which Samman testified at length as to his earlier history. Samman contended that the sole question was whether he, after having been adjudged insane by a court of competent jurisdiction in 1931, could enter his plea of guilty to an indictment charging him with a crime until the issue of whether he was restored to sanity or continued insane was determined in some manner prescribed by the statutes of this State. There the court said at pp. 545-546:

"We cannot agree with appellant as to the binding and conclusive effect of an adjudication of insanity. We have found no case, even at common law, holding that an

adjudication of insanity in some other court, at some earlier time, could be set up by collateral proceeding where the earlier adjudication was not even called to the attention of the court. Nor do we find any case where such a prior adjudication was relied upon as conclusive proof of insanity either as of the time of the commission of the crime or of the trial thereof. In fact, the rule appears to be that a prior adjudication is only prima facie, and not conclusive evidence of criminal irresponsibility. See 7 A.L.R. Annotation, 568. 68 A.L.R. Annotation, 1310.

"Illinois has, by statute, provided adequate means for safeguarding the rights of insane persons charged with crime. The portion of the statute here applicable provides:

"'An insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged: Provided, the act so charged as criminal shall have been committed in the condition of insanity. If, upon the trial of a person charged with crime, it shall appear from the evidence that the act was committed as charged, but that, at the time of committing the same, the person so charged was insane, the jury shall so find by their verdict, and by their verdict shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in case the jury shall find such person has not entirely and permanently recovered from such insanity, the court shall commit such person to the Department of Public Welfare. * * *' Smith-Hurd Anno. St. Ch. 38, section 592.

"This means that the sanity or insanity of a person charged with the commission of a crime shall be determined by a jury in the court where the cause is pending. People v. Howe, 375 Ill. 130, 30 N.E. 2d. 733. Illinois courts have uniformly held that the duty and responsibility of raising the question rests upon the accused and his counsel. People v. Haupris, 396 Ill. 208, 71 N.E. 2d, 68; People v. Wagner, 390 Ill. 384, 61 N.E. 2d 354; People v. Hart, 333 Ill. 169, 164 N.E. 156. This follows from the fact, stated in People v. Bacon, 293 Ill. 210, 127 N.E. 386, 388, that 'It has long been the law in this State that every man is presumed to be sane until the contrary is shown. In order to entitle the accused to an acquittal on the ground of insanity, this legal presumption must be overcome by evidence tending to prove insanity which is sufficient to raise a reasonable doubt of the sanity of the accused at the time of the commission of the act for which he is sought to be held accountable.' The courts have also indicated that to rely on prior adjudication, it must be shown that the insanity was of a permanent or continuing type. People v. Varecha, 353 Ill. 52, 186 N.E. 607. People v. Maynard, 347 Ill. 422, 179 N.E. 833, 836. In the latter case the Illinois court said, 'Whether the presumption arising out of an adjudication of insanity * * * has been overcome was a question of fact requiring evidence.'" (Italics ours.)

In People v. Nierstheimer, 401 Ill. 260 (advance sheet No. 4) our Supreme court, after quoting the italicized portion of the opinion in the Samman case, said at p. 280: "The quotation from the opinion of the Federal Circuit Court of Appeals is in accord with the principles announced by this court in People v. Varecha (353 Ill. 52, 186 N.E. 607), and followed in the present case." In the Nierstheimer case the court went on to say that a prior adjudication of feeble-mindedness is prima facie rather than conclusive evidence of criminal irresponsibility. It was then said at p. 281:

> "Numerous decisions state another familiar rule that the duty and responsibility of raising the question of sanity or insanity of a person charged with crime rests upon the accused and his counsel. (People v. Haupris, 396 Ill. 208; People v. Wagner, 390 Ill. 384.) In People v. Bacon, 293 Ill. 210, the court said, 'it has long been the law in this State that every man is presumed to be sane until the contrary is shown.'"

In view of the foregoing decisions it would serve no useful purpose to discuss defendant's contention that "the States Attorney is bound to bring the disability of the defendant to the attention of the court, so that a feeble-minded person will not be placed on trial."

Since a prior adjudication that defendant was feeble-minded was prima facie rather than conclusive evidence of his criminal irresponsibility and since the duty of raising the question as to whether or not he was mentally incompetent rested upon him and his counsel and neither of them apprised the court upon the trial on the indictments charging him with armed robbery that defendant had theretofore been adjudged to be feeble-minded, it must be held that, even

though the conviction and sentence of defendant in 1935 occurred only about 20 months after he had been adjudged to be feeble-minded, that fact may not be availed of by a collateral attack on the judgments under which he was committed to the penitentiary.

For the reasons stated herein the order of the Criminal Court of Cook County is reversed.

REVERSED.

Friend and Scanlan, JJ., concur.

44578

LIBERTY NATIONAL BANK OF CHICAGO, a national banking association, as Trustee under Trust Deed dated September 5, 1944, and known as Trust No. 5406, Appellant,	
v.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
JOSEPH POLLACK, trading as APCO MFG. Co., Not Inc., Appellee.	

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this forcible detainer action against defendant. There was a trial without a jury and a finding and judgment for defendant, from which plaintiff appeals.

It appears without dispute that defendant and his sister, Marion Pollack, were partners trading as Apco Mfg. Co., and obtained leases on the premises in question subsequently acquired by plaintiff as trustee, as well as a lease on adjoining property. The three separate parcels occupied by defendant had been previously occupied as one unit by the Fair Store. Defendant occupied the premises and had the leases in question before plaintiff secured title under the trust conveyance. On April 6, 1946, the partnership was incorporated under the name of Apco Mfg. Co., and the assets of the partnership were assigned to the corporation. The same business was conducted, and the same interests represented in the partnership were held by the defendant and his sister in the corporation. On November 30, 1945, fifteen months after defendant went into possession of the premises, Charles and Hyman Slivnick purchased the premises in question and conveyed

the same to the Liberty National Bank of Chicago, as trustee, in which trust the Slivnicks were the only beneficiaries. On December 21, 1945, twenty-one days after the Slivnicks purchased the property and conveyed the same in trust to plaintiff, this forcible detainer action was brought. The trust agreement provided:

> "It is understood and agreed by the parties hereto and by any person who may hereafter become a party hereto, that said Liberty National Bank of Chicago will deal with said real estate only when authorized to do so in writing and that it will (notwithstanding any change in the beneficiary or beneficiaries hereunder, unless otherwise directed in writing by the beneficiaries) on the written direction of Charles Slivnick and Hyman Slivnick or on the written direction of such person or persons as may be beneficiary or beneficiaries at the time, make deeds for, or otherwise deal with the title to said real estate, * * * said Trustee shall have no duty in respect to the management or control of said property or in respect to the payment of taxes or assessments or in respect to insurance, litigation or otherwise, except on written direction as hereinabove provided." (Italics ours.)

Paragraph 2 of the lease provided:

> "Said premises shall not be sub-let in whole or in part to any person other than Lessee, and Lessee shall not assign this lease without, in each case, the consent in writing of Lessor first had and obtained; * * *."

The fifth paragraph of the lease provided:

> "Lessee shall not cause or permit any waste, misuse or neglect of the water, or of the water, gas or electric fixtures."

The eighth paragraph of the lease in question contained this provision:

> "Lessee * * * shall make no changes or alterations in the premises by the erection of partitions * * * without the consent in writing of Lessor."

There are many breaches of the lease claimed as a basis for forfeiture. The evidence clearly discloses that practically all of the alleged breaches occurred before plaintiff acquired the leases in question, and existed and were created with the knowledge and consent of the prior owners. Defendant being in possession, plaintiff acquired the property subject to the rights of the parties in possession. One of those rights was to insist that there is no breach of the leases, since the prior lessors had consented to the matters complained of by plaintiff. One of the alleged breaches did occur after the acquisition of the property by plaintiff. This alleged breach consisted of the installation of electrical wiring, necessitating certain holes to be made in the walls to make provision for conduits, and the tearing out of the old electrical wiring. One of the witnesses for plaintiff testified that the buildings in question were more than a half century old; that the electrical wiring was outmoded; that the obsolete wiring constituted a definite fire hazard; that it violated the City code. At considerable expense defendant installed this new modern wiring, which was approved by the City authorities. The performance of this electrical work was justified, since the terms of the lease required defendant in the conduct of the business and use of the premises to comply with all City ordinances. Since the latter provision imposed an obligation upon the defendant, plaintiff cannot complain that it was done without plaintiff's consent. It could have urged a breach of the lease for failure to comply with the fire ordinances of Chicago, had defendant neglected to rectify the fire hazard. The law will not sanction such inconsistent positions.

clearly from the evidence that even after the claim of the existence of alleged breaches, plaintiff received and retained the monthly rental checks, up to and including the month of May 1948, when this cause was tried. It has been uniformly held that the acceptance of rent, after knowledge by the lessor of the alleged existence of the breaches of the lease, constitutes a waiver of such breach. Arado v. Maharis, 232 Ill. App. 282, and Waukegan Times Theatre Corp. v. Conrad, 324 Ill. App. 622. This rule is not applicable if the breach be of the continuing type, as was involved in Vintaloro v. Pappas, 310 Ill. 115, relied upon by plaintiff but distinguished in Arado v. Maharis. Plaintiff argues that the breaches complained of were continuing breaches. It points to the transfer of the assets of the partnership to a corporation and the occupancy of the premises by the corporation, in violation of the second paragraph of the lease against assignment or subleasing without the consent of the lessor. We have already pointed out that the corporate entity was controlled by this defendant and his sister, whose interests in the corporation were the same as in the partnership, and exactly the same business was conducted under the corporation. Factually, the instant case is not unlike Earp v. Schmitz, 334 Ill. App. 382, where it was held it did not constitute a breach of a similar covenant in a lease. To the same effect is Beacock v. Feltman, 243 Ill. App. 236.

Another reason why plaintiff cannot maintain this action is that the quoted provision of the trust agreement expressly precludes the trustee from exercising any right to deal with the property by litigation or otherwise, and

it shall have no duty in respect to the management and control of the same except upon the written direction of Charles Slivnick and Hyman Slivnick. There being no such written direction appearing of record before the institution of the suit, plaintiff, as trustee, had no right to institute the action. Pickering v. Lomax, 120 Ill. 289; Liberty Nat. Bank v. Kosterlitz, 329 Ill. App. 244; Sheets v. Security First Mortgage Co., 293 Ill. App. 222; Bogert on Trusts and Trustees. Plaintiff relies on Continental Ill. Nat. Bank and Trust Co. v. Windsor Amusement Co., 288 Ill. App. 57, which must be distinguished from the cases cited, because in the latter case the express provision in the trust agreement was: "The Trustee is the sole owner of the real estate held by it hereunder and so far as the public is concerned has full power to deal with it." Barnett v. Levy, 331 Ill. App. 181, cited by plaintiff, is not in point.

We have considered the other points raised by plaintiff for reversal of the judgment. We regard them without merit and a discussion of them unnecessary.

For the reasons indicated the judgment of the Circuit Court is affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.

44704

CLIFFORD E. FERNSTROM and DORTHEA A. FERNSTROM, Appellees, v. LEWIS J. WEST and ELIZABETH M. WEST, Appellants.	APPEAL FROM MUNICIPAL COURT OF EVANSTON

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an adverse judgment in a forcible detainer action brought to recover possession of premises occupied as a family residence. Plaintiffs have not followed the appeal.

The evidence shows that defendants were in possession of the premises as holdover tenants under a lease executed November 1, 1941 for the period commencing November 1, 1941 and expiring September 30, 1942. On May 22, 1948 the then owner of the property notified defendants by letter that they were occupying the premises "as holdover tenant under a written lease which expired September 30, 1942" and that the "present holdover lease will not be renewed and that the premises must be vacated by September 30, 1948." In July 1948 the then owners of the premises, and the plaintiffs as contract purchasers of same, again notified defendants that their lease would terminate September 30, 1948.

It is apparent from these notices that plaintiffs and their predecessor in title were mistaken as to the effect of the holding over by defendants upon the expiration of the original lease September 30, 1942. The holding over of defendants did not create year to year leases but leases for the same period as the original lease, namely eleven

months. Prickett v. Ritter, 16 Ill. 96. Consequently, defendants as holdover tenants were entitled to the possession of the premises for the period of eleven months from and after March 31, 1948, and plaintiffs could not by notice terminate the lease before that time. Heun v. Hanson, 331 Ill. App. 82.

The judgment for possession is erroneous and is reversed.

REVERSED.

Tuohy, J., concurs.
Feinberg, P. J., took no part.

44660

MARIE JUHASZ, Appellant,	)	
v.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO
PETER HAISAN and CAROLINE HAISAN, Appellees.	)	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

From a judgment for the defendants in a forcible entry and detainer action heard by a judge of the Municipal Court without a jury, this appeal is taken. No brief has been filed on behalf of the defendants.

The undisputed facts establish that on August 4, 1948 the plaintiff served a written notice on defendants that rent was due for the apartment occupied by defendants and that unless payment of rent was made on or before the expiration of five days the tenancy would be terminated. The defendants did not pay or tender the rent within five days. Some time later, when the case was called for trial, defendant Peter Haisan appeared pro se, stating that he received the five day notice and did not pay the rent because he had been sick. He stated that he was willing to pay. The court told defendant Peter Haisan to pay the rent and directed that judgment for possession be entered in favor of defendants.

The action of the court in this case is without legal sanction. After rent is due the landlord may demand payment and notify the tenant in writing that unless payment is made within a time specified, not less than five days

after service, the lease will be terminated. If the tenant shall not, within the time provided, pay the rent due, the landlord is entitled to possession. Woods v. Soucy, 166 Ill. 407. Proceedings under Section 2 of the Forcible Entry and Detainer Act (Ill. Rev. Stat. 1947, ch. 57, par. 2) are purely statutory and the statute must be strictly followed. The Biebel Roofing Co., Inc. v. Pritchett, et al., 373 Ill. 214.

The judgment of the Municipal Court of Chicago is therefore reversed and the cause remanded with directions to enter judgment in favor of plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

Feinberg, P. J., and Niemeyer, J., concur.

44712

107 4

TALMAN THOMAS,
Appellee,

v.

JAMES KING,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

337 I.A. 387

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

From a judgment for possession in favor of plaintiff on a verdict of a Municipal Court jury in a forcible entry and detainer action, defendant prosecutes this appeal.

Plaintiff, owner of the premises occupied by several tenants, sought possession of the two and one-half room apartment occupied by defendant allegedly for the use of himself and his family. Defendant contends that the record is without evidence to show that plaintiff acted in good faith; that plaintiff "is merely attempting to juggle his property for profit and does not need or legitimately require defendant's premises to live in"; and that in a forcible entry and detainer suit the plaintiff must be present in open court and testify. Defendant also complains of certain rulings and admission of evidence on the part of the trial judge.

The evidence shows that plaintiff purchased the premises in question in the year of 1946, and thereafter occupied a portion of the same with his wife, seven minor children, his stepfather, and brother. The premises consisted of a three story house and basement. There were two rooms in the basement occupied at the time of this suit by two elderly ladies. Plaintiff and his family occupied the first

floor consisting of four rooms and a bath. They also occupied one room on the second floor. Two and one-half rooms on the third floor are occupied by another tenant. Defendant occupied two and one-half rooms on the second floor front and had been there for a number of years prior to the purchase and occupancy by plaintiff.

Plaintiff urged on the question of good faith that he wished to enlarge the family living quarters by the acquisition of defendant's premises which was on a floor where plaintiff's family already occupied one room.

Testimony was offered on behalf of defendant that Betty Thomas, plaintiff's wife, told him he would be permitted to remain in the premises upon the payment of an additional rental, which conversation was denied by Mrs. Thomas. Under these circumstances, it was a question of fact for the jury to determine whether or not plaintiff was in good faith in seeking to acquire the portion of the premises occupied by defendant. If the purpose was to secure additional living quarters for this large family, then the jury were justified in finding plaintiff acted in good faith. We are not disposed to interfere with their conclusion.

Defendant urges that in a forcible entry and detainer action it is necessary for the plaintiff to appear in person and confront the defendant. Plaintiff's wife was the principal witness on behalf of the plaintiff and testified substantially to the facts set forth above. There is no rule of law which requires the plaintiff under such circumstances to testify in his own behalf. This assignment of error is without merit.

The defendant claimed that he was taken by surprise at the testimony of Mrs. Thomas to the effect that she had served notice of the termination of tenancy upon defendant's wife, and he moved to continue the case in order to produce his wife in rebuttal. An examination of the affidavit of service of the notice of termination of tenancy indicates that service was made on defendant by delivering a copy at his place of residence to Mrs. James King, defendant's wife. Under such circumstances no such surprise was shown as to entitle defendant to a continuance, and the trial court's ruling was correct.

Complaint is made of the admission of certain evidence. We have carefully examined the record and the rulings complained of and we find no substantial error in the admission or denial of testimony.

Accordingly, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Niemeyer, J., concurs.
Feinberg, P. J., took no part.

44041

HARRY E. WILLIAMS, Appellee,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff's suit in the Superior Court against the New York Central Railroad Company to recover damages for personal injuries sustained by him while working as a brakeman on one of the company's interstate trains, resulted in a verdict and judgment for plaintiff in the sum of $40,000.00. On review of the case we reached the conclusion that plaintiff's negligence was the sole proximate cause of his injuries, that the court should have directed a verdict for defendant, and because of its failure so to do the judgment of the Superior Court was reversed without remandment. Subsequently the Supreme Court of Illinois granted leave to appeal, and in the November term 1948 reversed the judgment here entered and remanded the cause with directions to consider the assignment of errors not disposed of in its opinion, and either affirm judgment of the trial court or reverse it and remand the cause for a new trial. (Docket No. 30845, not yet published.)

In its opinion the Supreme Court made a detailed recital of the facts and the allegations of the pleadings, and said that the question presented was "whether there is any evidence in the record from which it might reasonably be inferred that the defendant was guilty of any one or more of the charges of negligence and whether such negligence

proximately caused the injuries complained of." After reviewing the several charges made by plaintiff, the court concluded that "it cannot be said as a matter of law, that the verdict of the jury is without support in the evidence," and held in effect that all of the charges as to negligence were questions of fact to be determined by the jury. The decision of the Supreme Court disposes of the assignment of all errors except the amount of damages and the propriety of two instructions. In view of our conclusion in our prior opinion that plaintiff's negligence was the sole proximate cause of the accident, it was not necessary in that opinion to discuss or consider these questions.

From the medical testimony it appears that plaintiff sustained a comminuted fracture of the heel bone of the left foot. Dr. Pratt, one of the medical witnesses, described it as a "crumpled heel bone *** crushed, mashed." Although no fractures were sustained in the right foot, it too was seriously injured. Both Dr. Greenspahn and Dr. Speed, witnesses for plaintiff and defendant, respectively, agreed that although at the time of the trial there was a bony fusion of the fracture, the joint remained frozen and inflexible. It was the opinion of Dr. Greenspahn that the condition would be permanent and would interfere with the stability of the foot, and that there would be periodic swelling of the left ankle. It further appears that plaintiff suffered injuries to his back. He was in bed for a month, and had a cast on his leg

for twelve weeks. Thereafter he had to use crutches until June 1945, some seven months after the accident. Dr. Speed had ordered an ankle brace for him which he still wore at the time of the trial, and also at that time he used a cane to get around. He testified that it was difficult for him to stand on his left foot for more than an hour because it was still sore and stiff, and he said that his right foot also tired.

At the time of trial plaintiff had lost approximately two years in wages. His salary in 1944 was $2670.00. Subsequently there was an increase of approximately 18-1/2 cents per hour for brakemen and conductors. As a basis for determining his income, these figures indicate earnings of $3000.00 to $3500.00 a year. It is fairly certain that he will never be able to continue railroading in the position of brakeman or conductor, a vocation which he has followed exclusively for thirty years. Up to the time of the trial he had lost upwards of $6000.00 in wages as the result of his injuries. Considering his expectancy and the usual compulsory retirement age of seventy, his total money loss alone would equal the amount of damages awarded him. This does not take into account his pain and suffering and the physical handicap resulting from the accident. There is nothing to indicate that the amount of the verdict was induced by passion or prejudice, and we think the amount awarded plaintiff is not excessive.

Criticism is leveled at plaintiff's instruction No. 2, which reads as follows: "The Court instructs the jury

that prior to and on the 23rd day of November, 1944, there was in full force and effect certain acts of Congress known as the Federal Safety Appliance Acts, Section 11 of which provides among other things the following: 'All cars requiring *** secure running boards shall be equipped with such *** running boards.' You are further instructed that if you find from a preponderance of the evidence that the car in question was a car requiring a secure running board and if you further find from a preponderance of the evidence that said car was hauled or used by defendant on its lines without such secure running boards, the said provision of the Federal Safety Appliance Act was violated and if you further find from the evidence that the failure of defendant to so equip said car was the cause, in whole or in part, of the injury to the plaintiff, then you should find defendant guilty." This instruction required the jury to determine whether, under the evidence, car No. 291872 was the type of car requiring a running board. The instruction directed the attention of the jury to the evidence bearing upon the car in question and told them that if they found from a preponderance of the evidence that it was one requiring a running board and if defendant used or hauled the car on its lines without a running board, the Safety Appliance Act was violated. Since, under the decision of the Supreme Court, the question whether the failure to provide a running board was the cause of the accident, in whole or in part, was a matter for determination by the jury, we think the instruction was not improper.

It is further contended that the court erred in refusing to give one or more of defendant's refused instructions numbered 1, 2, 3 and 4. It was plaintiff's contention that in removing the roof and running board from car No. 291872 without an order from the Interstate Commerce Commission defendant violated sections 11-16 of the Safety Appliance Act. The refused instructions 1 to 4 ignore such a violation of the act. To give them to the jury would have introduced issues that are not in the case, and would have had the effect of directing a verdict for defendant on questions that are in the case. In view of the conclusions of the Supreme Court it would have been prejudicial to plaintiff to give them.

For the reasons indicated the judgment of the Superior Court must be affirmed, and it is so ordered.

Judgment affirmed.

Sullivan, P. J., and Scanlan, J., concur.

APPELLATE COURT

STATE OF ILLINOIS

FOURTH DISTRICT

February Term A. D., 1949

Term No. 49F2 Agenda No. 4

In the Matter of the Estate of John H. Cope, Deceased. DOY MEADOR, Administrator of the Estate of Alice Lavona Cope, Deceased, Objector-Appellee,	)	Appeal from the Circuit Court of Wayne County, Illinois.
-v-	)	
LAURA HUGHES, Administratrix of the Estate of John H. Cope, Deceased, Respondent-Appellant.	)	

BARDENS, J.

This case reaches this court on an appeal from an order of the Circuit Court sustaining objections to the final report of Laura Hughes as administrator of the estate John H. Cope, deceased. John H. Cope, a widower, married Alice Lavona McConnaughhay, a widow, on May 10, 1925. They lived together as man and wife until the death of John H. Cope on February 4, 1946. Alice Lavona, who is quite commonly known as "Vona", died eight days later. Mrs. Cope left no children but John H. Cope left surviving him some children by a former marriage. Laura Hughes, a daughter of John H. Cope, was appointed administrator of his estate. Doy Meador was appointed administrator of Mrs. Cope's estate. The final report of Laura Hughes as administrator was filed in the county court in probate and made no provision for the payment of any distributive share to the administrator of the estate of Alice Lavona Cope.

Attached to said final report was a copy of a purported post nuptial agreement between John H. Cope and Vona Cope in which each purported to release all claims or interest in the property of the other. Objections to said final report were filed by Doy

Meador, administrator of the estate of Alice Lavona Cope, the principle contention of the objector being that the purported agreement did not bear the genuine signature of Alice L. or Vona Cope. The county court over-ruled the objection and appeal was had to the Circuit Court of Wayne County, Illinois. The Circuit Court sustained the objections and ordered the said Laura Hughes as administrator to file a new accounting and final report in which ahe should provide for payment of one-third of the net assets to the objector. From this judgment Laura Hughes as administrator, who will be hereinafter referred to as respondent, appealed to this court.

The sole question raised by the pleadings and the evidence and by the assignment of error is the genuineness of the signature of Vona Cope on respondent's exhibit I, which is the purported post nuptial agreement. This purported agreement was not found amoung the papers of John H. Cope. However it was proven that the home had been broken into before the administrator took possession of his papers. At some later time the agreement was received through the mail by a sister of Laura Hughes in which envelope was also enclosed a note reading as follows:

"This was found in the barn at sale.

A friend"

It was proved that there had been a sale of the personal assets of the John H. Cope estate and that this letter was received some time after that date.

None of the witnesses saw the parties sign the agreement and therefore the proof of genuineness of signature of Vone Cope was necessary. The Respondent introduced into evidence a number of exhibits bearing genuine signatures of John H. Cope with which we are not particularly concerned since the question is as to the genuineness of the signature of Vona Cope. Respondent introduced five exhibits, numbers 4, 5, 6, 7, and 8, which were song books found in the trunk of Vona Cope after her decease and on which exhibits (with the exception of exhibit 8) were written

in pencil the name "Vona Cope". These were offered as standards of comparison. No witness could say who wrote the words "Vona Cope" on these exhibits and they are in the record only because two non-expert witnesses expressed an opinion that the words were in the handwriting of Vona Cope. No effort was made, however, to comply with the evidence act to have these exhibits introduced as admittedly genuine and the Court in passing upon their admission admitted them subject to objections. These exhibits, therefore, do not stand before us as admittedly genuine or as proved to be genuine to the satisfaction of the lower Court.

Respondent's exhibit 16, being the marriage license between John H. Cope and Alice L. McConnaughhay, was admitted as containing the genuine signatures of both parties on the back thereof and objector's exhibits 1 and 2, being the deeds executed by Alice L McConnaughhay in 1922 and 1924, have been treated as genuine signatures. All original exhibits bearing upon the question of signatures have been certified and transferred to this Court for our examination.

Both parties agree that the repondent has the burden of proof and that this Court will not substitute its judgment for that of the trial court unless from an examination of the original exhibits together with the whole record, we determine that the trial court's judgment was against the manifest weight of the evidence.

We have examined the original exhibits and find that the purported signature of Vona Cope on respondent's exhibits I is in many respects similar to the writing of "Vona Cope" on respondent's exhibits 4, 5, 6, and 7, but find the purported signature on exhibit I differs in material respects from the admittedly genuine signature on respondent's exhibit 16 and the proven signatures on the objector's exhibits 1 and 2. We find one especially striking dissimilarity between the questioned signature and all of the other exhibits mentioned, viz: in the other exhibits the letters slant or lean to the right, whereas

in the questioned signature most of the letters are practically vertical to the line underneath.

There was some evidence in the trial court that John H. Cope made statements that a post nuptial agreement had been signed by the two parties, but there was also evidence that Vona Cope had stated she had never signed any agreement. These statements were made out of the presence of the other spouse and therefore seem to us to be inconclusive. From our examination of the original exhibits before us and from the review of the whole record, we can not say that the trial court's finding was against the manifest weight of the evidence. The judgment of the lower court should therefore be affiemed.

Judgment affirmed.

Culbertson, P. J. , and Scheinemen, J., concur.

Publish abstract only.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A.D. 1949

Term No. 49F18 Agenda No. 13

J. N. KLEIN, Plaintiff-Appellant,	)	Appeal from the
-vs-	)	Circuit Court of
RICHARD T. O'BRIEN, Defendant-Appellee.	)	Clay County, Illinois.

CULBERTSON, P. J.

This is an appeal from a judgment of the Circuit Court of Clay County, which resulted from a distress action by J. N. KLEIN, Appellant, (hereinafter called the landlord), as against RICHARD T. O'BRIEN, Appellee (hereinafter called the tenant). The distress action for rent and for damages was based upon the failure of the tenant to faithfully perform the covenants of a farm lease.

The action was instituted in the Circuit Court under a distress warrant directed to the Sheriff of Clay County to levy on the growing crop of wheat and the growing crop of hay of the tenant. The distress warrant was levied for $100.00 in cash rent, one-third of the wheat crop, one-third of the wheat straw, one-half of the redtop hay, and one-half of the redtop seed, and for "damages of $1,000.00 for tenant's failure to faithfully perform the terms of the lease." Two individuals, Pearl Slagley and Russell Wires, both filed intervening petitions claiming prior liens to the plaintiff of $150.00 and $70.12 respectively, for labor performed in harvesting part of the wheat crop. The United States of

America, through the Farmers' Home Administration, filed an intervening petition, claiming a lien prior to that of plaintiff by virtue of a Federal mortgage on the wheat and hay crops, except the landlord's part thereof, but after a hearing on the pleadings the intervening petitioner, United States of America struck that portion of the petition which claimed a lien prior to that of the plaintiff landlord. The tenant was a minor, who was farming with the help of a "G-I" loan.

The cause was heard by the Court, without a jury. The Court, in a written order entered after hearing the evidence, found that defendant tenant breached the provisions of his lease and that plaintiff was authorized to issue and levy a distress warrant and that the Sheriff had distrained wheat in harvest on 80 acres, and 60 acres of growing redtop. The Court further found that the plaintiff landlord had the right to complete the harvesting of crops and perform the covenants of the lease left unperformed by the tenant, sell the crops, pay the expenses necessary to be paid under the lease, retain the amount of rent due, and then turn the balance over to the mortgagee, Federal Farm Security Administration; that defendant tenant sold 154 bushels of wheat at $333.69 and delivered 60 bushels of wheat to plaintiff landlord's bin, and that the total value of the wheat delivered to plaintiff was $129.60; that the plaintiff landlord harvested and sold wheat of the value of $805.69; and that plaintiff was entitled to one-third of the wheat, but was obligated under the lease to pay one-third of the machine bill for threshing; that the wheat was all combined, and that plaintiff owed $190.00 therefor; and that there was due the intervener, Pearl Slagley, $120.00; and that of these several amounts which aggregate $310.00, plaintiff should be charged with one-third, or $103,33, and defendant tenant with $206.67; that the intervener, Russell Wires was employed by defendant tenant to haul wheat and that there was due him $70.12, for which plaintiff

was not liable. The Court then struck an account as between the parties based on such findings, and further found that the redtop grass and seed were harvested by plaintiff landlord and plaintiff received his proper share of this crop, and that the tenant was not entitled to recover anything in connection therewith; and the Court also found that plaintiff was not entitled to recover any damages from defendant for failure to comply with any of the other conditions of the lease. The Court also found that plaintiff was not entitled to a lien upon money derived from the balance of the crops raised on plaintiff's farms, which items aggregate $893.37 (money paid by plaintiff to buy seed wheat, fertilizer, repairs on tractor, etc.). The Court then ordered that plaintiff pay the cost of the proceeding out of the moneys on hand; that he pay to Russell Wires, $70.12; that he pay to Pearl Slagley, $120.00; that he pay for the Federal Farm Security Administration, $145.71; and that plaintiff retain the balance.

The plaintiff landlord filed notice of appeal and contends that the judgment should have been entered for damages in favor of the landlord as against the defendant tenant in the sum of $1,000.00 for failure to faithfully perform the terms of the lease, and that he should reimburse himself, as damages, from the balance as far as it would go.

It is first contended that plaintiff should not be charged with one-third of the aggregate amount of the wheat combining bill. The lease between the plaintiff and defendant expressly provides that the landlord was to pay "one-third of the machine bill for threshing wheat." The conclusion of the Court in finding that plaintiff was responsible for one-third of the combining bill was clearly justified. The record before us also sustains the findings of the Court below and justifies the conclusions of the Court based on such findings.

There are a number of contentions made on appeal as to the fact that the lien given by Statute to the landlord is

paramount to that of a judgment creditor, etc. There seems to have been no doubt in the mind of the Court below as to the priority or the nature of the landlord's lien, and the only question is whether or not the plaintiff is entitled to damages under the facts in this proceeding. The evidence was conflicting as to matters of performance on the lease, aside from the question of payment of rent. This Court cannot say on appeal that a failure of defendant to plant wheat, or corn, or oats, or to save the wheat straw, under the facts, is such as to justify this Court on appeal in reversing the Trial Court as to such finding of fact and to allow plaintiff to reimburse himself for damages and expense as far as money in hands of plaintiff will go, before being ordered to pay over any sums to other lien holders in the cause. The Court below in the written finding, expressly concluded that plaintiff was not entitled to recover damages from defendant for failure to comply with any of the other conditions of the lease. Where facts are in dispute and a Trial Court hears the evidence and passes on questions of fact, the Appellate Court will not, on appeal, set aside such findings unless they are clearly contrary to the manifest weight of the evidence (VLADOFF vs. ILLINOIS BANKERS LIFE ASSN. CO., 320 Ill. App. 387, 389; MOUSETTE vs. MONARCH LIFE INS. CO., 309 Ill. App. 224, 233).

The judgment of the Circuit Court of Clay County will, therefore, be affirmed.

Judgment affirmed.

Bardens, J., and Scheineman, J., concur.

(Abstract)

No. 10323

In the

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1948

ANGELA CLARA KNEER, Plaintiff-Appellant, vs. PEORIA-ROCKFORD BUS LINES, INC., a corporation, Defendant-Appellee.	Appeal from Circuit Court, Winnebago County. Honorable William R. Dusher, Judge Presiding

BRISTOW, J. -- Angela Clara Kneer received personal injuries on October 12, 1945, while traveling as a fare-paying passenger in one of defendant's busses. She entered the bus in Roc kford, Illinois, and was enroute to Milwaukee, Wisconsin. The accident happened 12½ miles north and east of Rockford, Illinois, at the intersection of Route 173 and Argyle Road.

The bus, which had the capacity to carry 37 passengers, left the depot in Rockford at 5:00 P.M. and there was some testimony that it was late in its departure. It reached the intersection at 5:30 P.M., just about sundown. It was a clear day and the pavement was dry and there was an unobstructed view of the intersection from all directions.

The bus was traveling in an easterly direction on Route 173, a two-lane paved highway. Driving from the north was a car being operated by Albert Schroeder, which collided with the bus, causing it to drive into a field to the north, turn over, thereby causing injuries to plaintiff.

A complaint was filed in the Circuit Court of Winnebago County by Angela Kneer, charging the bus company with failure

No. 10343

In the

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 19[illegible]

ANGELA [illegible] KNEER,	Appeal from
Plaintiff-[illegible],	Lake County.
	[illegible] County.
PUBLIC-SERVICE COMPANY, [illegible] a corporation,	[illegible]
Defendant-[illegible].	[illegible]

APPELLEE, J. — Angela [illegible] [illegible] Junior on October 18, 19[illegible], [illegible] passenger in one of defendant's buses. [illegible] in the Lake Grove, Illinois, [illegible] to [illegible] counsel. The accident happened [illegible] Illinois, on the [illegible] of [illegible] 19[illegible].

The bus, which [illegible] left the depot in [illegible] seating by that time [illegible] intersection at 2:30 [illegible] clear day and the pavement [illegible] view of the intersection [illegible].

The bus was travelling [illegible] 179, a two-lane paved [illegible]. During the [illegible] car being operated by [illegible], a [illegible] the bus, causing it to drive [illegible] over, thereby causing injuries to plaintiff.

A complaint was filed in the Circuit Court of Winnebago County by Angela Kneer, charging the bus company with failure

to exercise that degree of care that is imposed upon them as a common carrier. Defendant, in its answer, denied the charge of negligence. Before a trial by a jury there was a verdict of not guilty. The court overruled a motion for new trial and entered judgment upon the verdict, for defendant in bar of action and for cost. Plaintiff perfected this appeal.

The errors assigned and argued by appellant in her brief, present the following questions for our determination. (1) Was the verdict against the manifest weight of the evidence? (2) Was the bus traveling at an excessive rate of speed. (3) Did the driver fail to take steps to prevent the accident after realizing the perils ahead? (4) Was the jury erroneously instructed?

On the trial of this cause the plaintiff testified that the bus was traveling 60 to 65 miles per hour; that Argyle Road is a black top highway running north and south and is about 18 feet in width; the driver of the bus saw the Schroeder car coming and blew one long blast, but he continued on without any decrease in speed, and when he saw the car continuing on, he blew his horn again; that as one approached the intersection you could see north on Argyle Road for at least 1000 feet.

The evidence further shows that the Schroeder car drove into the intersection without stopping; that there was a collision between the two vehicles; that after the impact the steering apparatus on the bus was broken, whereupon the bus driver lost control of the bus, which veered to the left, overturning in a field about 400 feet from the highway.

The bus driver testified that he was traveling at about 45 miles per hour; that the collision occurred on the south side of the highway; that the Schroeder car ran into the left side of his bus without stopping and observing the two "stop" signs, one located 100 feet and another 500 feet north on Route 173.

Nella J. Duke, a witness who was called on behalf of plaintiff, testified that she was standing immediately behind the driver, and that the bus was proceeding at a moderate rate of speed, and that immediately prior to the accident the driver honked his horn at least three times.

The evidence further reveals that after the accident the plaintiff was taken to the St. Anthony Hospital in Rockford, Illinois, where she was a patient for two weeks. In view of the conclusions we have reached, it is not necessary to consider the evidence concerning her injuries. There was considerable dispute on thisissue.

While the plaintiff was in the hospital, James Good, an investigator for the defendant, interviewed the plaintiff with respect to the accident. At that time plaintiff said that at the time of the crash that the bus was operated all right; that "I have no criticism to find with the bus driver."

The testimony of all the witnesses, both for plaintiff and defendant, except that of appellant, indicate very clearly that the bus was not being driven at an excessive rate of speed. A careful reading of this record points to the conclusion that the sole cause of this accident was the failure of the Schroeder car to stop at the intersection. We believe the jury's verdict could have been none other than that of not guilty.

This court had occasion recently to point out the importance of stopping at a stop sign; Ritler v. Nieman 67 N.E. 417, 421. The court made this observation. "The operator of a motor vehicle, when he stops at a preferred highway, should ascertain if he can proceed safely across such highway. If he can not, he should not enter it. Merely stopping some place near a stop sign does not necessarily discharge one's duty. There is no virtue in stopping at a place when one can not see. A stop sign is a challenge to motorists to stop at a point where, by the use of one's faculties, one can definitely ascertain if he can safely proceed into the protected thoroughfare."

Kelly J. Duke, a witness who was called on behalf of plaintiff, testified that she [illegible] [illegible] directly behind the driver, and that [illegible] [illegible] proceeding [illegible] [illegible] rate of speed, and [illegible] [illegible] [illegible] [illegible] driver [illegible] [illegible] [illegible] [illegible].

The evidence [illegible] [illegible] [illegible] [illegible] the plaintiff was taken to [illegible] [illegible] [illegible] ford, Illinois. [illegible] [illegible] [illegible] [illegible]. In view of the conclusion [illegible] [illegible], [illegible] not necessary to consider the evidence of [illegible] injuries [illegible] considered [illegible] [illegible] [illegible].

Right [illegible] [illegible] [illegible] [illegible] [illegible], [illegible] investigation [illegible] [illegible], [illegible] [illegible] with respect to [illegible]. At the time [illegible] [illegible], that at the time of [illegible] [illegible] [illegible] [illegible], right; [illegible] [illegible] [illegible] [illegible] [illegible]."

The testimony of all the witnesses, both for plaintiff and defendant, [illegible] [illegible] [illegible], [illegible] clearly that [illegible] [illegible] [illegible] [illegible] of speed. A careful [illegible] [illegible] [illegible] conclusion that [illegible] [illegible] [illegible] failure of the defendant to stop [illegible] [illegible]. We believe the [illegible] [illegible] [illegible] that of not guilty.

This court has recently [illegible] to point out the importance of stopping at a stop sign. Ritter v. [illegible] 67 N.E. 417, 421. The court made this observation, "The operator of a motor vehicle, who is to stop at a preferred highway, should ascertain if he can proceed safely across such highway. If he can not, he should not enter it. Merely stopping at some place near a stop sign does not necessarily discharge one's duty. There is no virtue in stopping at a place when one can not see. A stop sign is a challenge to motorists to stop at a point where, by the use of one's faculties, one can definitely ascertain if he can safely proceed into the protected thoroughfare."

Some other cases where the courts have had occasion to emphasize the duties of a motorist when entering upon an arterial highway are: Wachsmuch v. Flanagan, 355 Ill. App. 311; Warren v. Burke, 302 Ill. App. 85; Piper v. Yellow Cab Company, 246 Ill. App. 487;

The evidence shows indisputably that the driver of the Schroeder car drove upon a highway at the intersection in question without stopping. The bus driver had a right to assume that Albert Schroeder would stop his car and would ascertain whether or not he could proceed with safety upon the highway before he did so. The law does not require that degree of vigilence on the part of a carrier that its driver must decrease its speed at every intersecting highway to make sure that every driver of a motor vehicle operating thereupon complies with the law.

The driver of the Schroeder car had a clear, unobstructed view of the highway for a distance of 1000 feet. If this driver had complied with the law and stopped his car, he would have ascertained that he could not proceed upon Route 173 at the time in question in safety. The jury was clearly right in determining that it was his negligence that was the sole cause of the accident, that gave rise to this litigation. The trial court entertained a similar view, and in denying a motion for new trial he had this to say: "I am satisfied by the manifest weight of the evidence, the bus driver was not guilty of failure to exercise the highest degree of care and that the facts are that the Schroeder car ran into the side of the bus, and he could not reasonably anticipate or guard against it."

Counsel for appellant has brought to our attention much criticism of the instructions given on behalf of appellee. We do not find any substantial or grievous error in this assignment. We can safely conclude that, assuming there is some merit in a few of the objections made, such error

Some other cases where the courts have had occasion to emphasize the duties of a motorist's attorney upon an external highway are: Markowsky v. Fleischer, 255 Ill. App. 211; Warren v. Burke, 208 Ill. App. 83; Illes v. Illinois Central Company, 246 Ill. App. 424;

The evidence more indisputably than the driver of the Sourbeder car drove upon a highway at the intersection in question without stopping. The fact driver had a right to assume that Albert Sourbeder would stop his car and would exercise ordinary care and not proceed with safety upon the highway before he did so. The law does not require that degree of vigilance on the part of a passenger that the driver must exercise for himself at every intersection. A passenger is under no duty to warn the driver of a motor vehicle approaching from the right.

The driver of the Sourbeder car had a clear, unobstructed view of the highway for a distance of 1[illegible] feet. If this driver had complied with the law of Illinois, he would have observed the approaching car and would not proceed from Route 172 at the time in question in evidence. The jury was clearly within its province in [illegible] the role cause of the accident, and [illegible] the trial court substituted a different view, and [illegible] motion for new trial [illegible] to say: "I am satisfied by the manifest weight of the evidence, the driver was not guilty of traffic violations sufficient to warrant the trial court and that the death was [illegible] Sourbeder car [illegible] side of the road, and he could not reasonably anticipate or guard against it."

Counsel for appellant has brought to our attention such criticism of the instructions given on behalf of appellee. We do not find any substantial or prejudicial error in this assignment. We are entirely convinced that, assuming there is some merit in a few of the objections made, such error

was not of such grave character that a different result could reasonably be anticipated had it not occurred. Consequently we do not deem it necessary to burden this opinion with a detailed consideration of what counsel for both appellee and appellant have had to say about the various instructions.

We are convinced that the appellant has had a fair trial and that the jury's verdict and judgment entered thereon represent substantial justice and should be affirmed.

JUDGMENT AFFIRMED.

was not of such grave character that a multilateral treaty could reasonably be contemplated but it not necessary. Consequently we do not deem it necessary to provide this opinion a detailed consideration of the [illegible] appellee and appellant have [illegible] their instructions.

[illegible]

No. 10334

In the

APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D. 1949.

AUSTIN A. MITCHELL, Plaintiff-Appellee,	Appeal from the City Court of Elgin, Kane County, Illinois.
vs.	Honorable Harry C. Daniels, Presiding Judge.
WALTER W. GEISTER, Defendant-Appellant.	

BRISTOW, J. -- Defendant, Walter W. Geister, is appealing from an order of the city court of Elgin, Kane County, entered in a trial without a jury, awarding plaintiff, Austin A. Mitchell, a real estate commission of $470 for procuring a purchaser of property owned by defendant.

No. 10334

In the

APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D. 1940.

AUSTIN A. MITCHELL, Plaintiff-appellee, vs. WALTER A. GEISLER, Defendant-appellant.	Appeal from the City Court of Elgin, Kane County, Illinois. Honorable- Harry C. Beckle, Presiding Judge.

BRISTOW, J. -- Defendant, Walter V. Geisler, is appealing from an order of the city court of Elgin, Kane County, entered in a trial without a jury, awarding plaintiff, Austin A. Mitchell, a real estate commission of $470 for procuring a purchaser of property owned by defendant.

Defendant's appeal presents two issues for our determination: whether repugnant causes of action were improperly joined in one count of the complaint, and whether the trial court erred in concluding that plaintiff was the procuring cause of the sale, and, therefore, entitled to the commission.

Plaintiff proceeded to trial without a jury under the third count of the complaint, which alleged that plaintiff, a licensed real estate broker in Elgin, was requested by defendant on June 4, 1947 to sell certain real estate, for which defendant agreed to pay a 5% commission; that between June 4, 1947 and November 18, 1947, plaintiff and James E. Chase, or one of them, procured a purchaser who bought the property; and that defendant has refused, after demand, to pay plaintiff $470, or 5% of the sale price.

To this complaint plaintiff attached the affidavit of James Chase stating, in substance, that he had on September 19, 1947 shown the premises to Mrs. Hattie Host and that for consideration he assigned whatever claim he may have for a brokers commission to Austin A. Mitchell.

The evidence consisted of the testimony of plaintiff, his salesman, Harvey Thurwell, and Hattie Host, and included certain exhibits which are not material to the controverted issues herein.

According to the testimony of plaintiff and that of his salesman, Harvey Thurwell, the defendant, Walter Geister, listed his property at 1020 Morton Avenue, Elgin, with plaintiff on June 19, 1947, to sell for $11,500, or a close offer, at a commission of 5%. Subsequent conversations in August between plaintiff and defendant reaffirmed the listing, and the fact that plaintiff was endeavoring to find a purchaser. On or about September 15, 1947, at about 6:30 P. M., plaintiff, or his salesman, showed Hattie Host and her daughter the property from the outsdie, inasmuch as the occupant was not at home. Mrs. Host was informed of the price, and that the property was owned by Walter Geister. Plaintiff, thereupon, made another appointment for Mrs. Host to see the premises, and his salesman, Harvey Thurwell, drove her to the

Defendant's appeal presents two issues for our determination: whether repugnant causes of action were improperly joined in one count of the complaint, and whether the trial court erred in concluding that plaintiff was the procuring cause of the sale, and, therefore, entitled to the commission.

Plaintiff proceeded to trial without a jury under the sixth count of the complaint, which alleged that plaintiff, a licensed real estate broker in Elgin, was requested by defendant on June 4, 1947 to sell certain real estate, for which defendant agreed to pay a 5% commission; that between June 4, 1947 and November [illegible], 1947, plaintiff and James E. Chase, one of them, procured a purchaser who bought the property; and that defendant has refused, after demand, to pay plaintiff $[illegible], or 5% of the sale price.

To this complaint plaintiff attached the affidavit of James E. Chase stating, in substance, that he had on September 13, 1947 shown the premises to Mrs. [illegible] and that for consideration he assigned whatever claim he may have for a brokerage commission to Austin A. Mitchell.

The evidence consisted of the testimony of plaintiff, his salesman, Harvey Thurwell, and Bertie Hoag, and included certain exhibits which are not material to the controverted issues herein.

According to the testimony of plaintiff and that of his salesman, Harvey Thurwell, the defendant, Walter Geisler, listed his property at 1020 Norton Avenue, Elgin, with plaintiff on June 19, 1947, to sell for $11,500, or a close offer, at a commission of 5%. Subsequent conversations in which both the plaintiff and defendant reaffirmed the listing, and the fact that plaintiff was endeavoring to find a purchaser. On or about September 13, 1947, at about 6:30 P. M., plaintiff, or his salesman, showed Bertie Hoag and her daughter the property from the outside, inasmuch as the occupant was not at home. Mrs. Hoag was informed of the price, and that the property was owned by Walter Geisler. Plaintiff, thereupon, made another appointment for Mrs. Hoag to see the premises, and his salesman, Harvey Thurwell, drove her to the

property on September 22, at which time she stated that she had been shown the interior.

Plaintiff endeavored to get Mrs. Host to make an offer for the property during the remainder of September and October, since she had stated on numerous occasions that she would buy the property, but that she wanted the price to include a new furnace.

On November 8 plaintiff's salesman again drove Mrs. Host out to the premises after visiting other properties, and he stated, "This is what you should buy." She repeated that there were too many repairs necessary at that price, and the salesman asked her to make an offer. On November 16, two days before Mrs. Host signed the contract, she was in plaintiff's office, and he referred to the Morton Avenue property, and urged her to buy it.

From the tenant on the premises, plaintiff learned that defendant had sold the property. He immediately contacted defendant on November 20 and informed him that plaintiff's salesman had shown the property to Mrs. Host and endeavored to sell it to her, and that they had a file on their negotiations with Mrs. Host. Defendant, however, denied plaintiff's right to a commission, and withdrew any real estate listings that he may have had with plaintiff. Upon learning from defendant that James Chase had also shown the property, plaintiff secured an assignment from Chase, who was a salesman rather than a real estate broker, for any interest that he may have acquired in a commission.

The foregoing testimony was controverted by that of the purchaser, Mrs. Host, testifying on defendant's behalf. She stated that Thurwell had contacted her and made an appointment to show her the property, but when they drove up to the house

property on September 22, at which time she stated that she had been shown the interior.

Plaintiff endeavored to get Mrs. Hoot to make an offer for the property during the remainder of September and October, since she had stated on numerous occasions that she would buy the property, but that she wanted the price to include a new furnace.

On November 3 plaintiff's salesman again drove Mrs. Hoot out to the premises after visiting other properties, and he stated, "This is what you should buy." She responded that there were too many repairs necessary, and [illegible] asked her to make an offer. On November 11, [illegible] before Mrs. Hoot signed the contract, [illegible] plaintiff's office, and he referred to the [illegible] and [illegible] to buy it.

From the [illegible] on November, plaintiff learned that defendant had sold the property. He immediately sent a [illegible] defendant on November 20 and informed him that plaintiff's salesman had shown the property to Mrs. Hoot and endeavored to sell it to her, and that they had a file on their negotiations with Mrs. Hoot. Defendant, however, denied plaintiff's right to a commission, and [illegible] any real estate listings that he may have had with plaintiff. Upon learning from defendant that James Chase had also shown the property, plaintiff secured an assignment from Chase, who was a salesman rather than a real estate broker, for any interest that he may have acquired in a commission.

The foregoing testimony was controverted by the wife of the purchaser, Mrs. Hoot, testifying on defendant's behalf. She stated that Thurwell had contacted her and made an appointment to show her the property, but when they drove up to the house

she informed him that she had already seen the interior, since James Chase had shown her the premises a few days before. Some time thereafter she claims that she noted an ad in the paper, and discovered, after she had contacted the owner, Walter Geister, that it was the same property Thurwell and Chase had shown her. Defendant, Geister, told her that the price was $10,000, and she asked to be contacted if it came down. When he called to report a price of $9,500 she asked for a further reduction, and when the premises were offered at $9,400 she agreed to purchase the property.

Mrs. Host did admit, however, that she was in plaintiff's office on November 16, two days before the purchase contract was signed, and that plaintiff's salesman and Chase were the only persons who had ever shown her the property. She could not remember whether plaintiff had ever shown her any property, or if he did, it was only one place. Nor did she recall looking at properties with Thurwell on November 8, but if she did go with him, she did not recall seeing the property at 1020 Morton Avenue.

On the basis or the foregoing evidence the city court entered judgment for plaintiff for the $470 commission, from which defendant is appealing.

Defendant contends, first, that count 3 contains repugnant claims which cannot properly be joined in one count. As hereinbefore noted, this count recites that plaintiff and James E. Chase, or one of them, between June 4, 1947 and November 18, 1947, procured a purchaser ready, able and willing, who did purchase the premises from defendant on November 18, for $9,400, for which plaintiff seeks a commission in the amount of $470.

Plaintiff maintains that this count presents alternative statements of fact authorized under the Civil Practice Act, and that the alternative claims may properly be stated in one count.

Sec. 43 of the Civil Practice Act (§167 (2) ch. 110, Ill.

she informed him that she had already [illegible] James Chase had shown her the premises a [illegible] before. Some time thereafter she claims that she read [illegible] in the paper, and discovered, after she had contacted the [illegible], Walter Geisler, that it was the same property Thurwell and Chase had shown her. Defendant, Geisler, told her that the price was $[illegible],000, and she asked to be contacted if it came down. When he called to report a price of $[illegible],000 she asked for a [illegible], and when the premises were offered [illegible] the property.

Mrs. [illegible] admit, however, that [illegible] office on November 16, two days before the [illegible] was signed, and that Mr. Geisler [illegible] only persons who had seen the property. She could not remember another plaintiff had seen her [illegible] or if he did, it was only one place. [illegible] at property on which Thurwell on November 6, but [illegible] with him, she did not recall [illegible] Center Avenue.

On the basis of the pleadings [illegible] the city court entered judgment for plaintiff for the $[illegible] commission, from which defendant is appealing.

Defendant contends, first, that [illegible] claims which cannot properly be joined in one count. As heretofore noted, this court reduces that plaintiff and James T. Chase, or one of them, between June 4, 1947 and November [illegible], 1947, procured a purchaser ready, able and willing, the [illegible] premises from defendant on November 16, for $[illegible], for which plaintiff seeks a commission in the amount of $[illegible].

Plaintiff maintains that this count presents alternative statements of fact authorized under the Civil Practice Act, and that the alternative claims may properly be stated in one count. Sec. 43 of the Civil Practice Act (ch. 110, 111.

Rev. Stats., 1947) provides:

> "When a party is in doubt as to which of two or more statements of fact is true, he may state them in the alternatives . . . ."

Careful reading of the terms and purport of count 3 indicates that plaintiff is in doubt as to whether the evidence will establish that he alone procured the purchaser, or that James Chase will be shown to also have an interest, and plaintiff has endeavored, therefore, to phrase the complaint so that it will be adequate if the evidence indicates that Chase had an interest in the commission, to which plaintiff would be entitled by virtue of the assignment. This is clearly the type of situation contemplated by this section of the statute and under its terms plaintiff is entitled to plead in the alternative.

Moreover, it is our opinion that these alternative claims may be presented in a signle count, under the Civil Practice Act and supplemental rules promulgated by the Supreme Court of Illinois.

Rule 12 (§259.12, ch. 110, Ill. Rev. Stats.) provides:

> "Different breaches of a contract, bond or other obligation and different breaches of duty whether statutory or at common law or both, growing out of the same transaction or based on the same set of facts, may be treated as a single claim or cause of action and set up in the same count."

This rule was interpreted in Winn v. Underwood, 325 Ill. App. 297, to authorize the joinder of alternative claims in the same count. Plaintiff therein sought alternative relief under different sections of ch. 94 for the wrongful mining of fluorspar. The court stated that in view of the provisions of the Practice Act, and the language of Rule 12, whereby a party shall not be required to plead separately causes of action arising out of the same transaction, it would not be grounds for dismissal that alternative claims for relief were stated in the same count, and the order dismissing the complaint was erroneous. The court distinguished this situation from a case where separate and

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unrelated causes of action, based upon different transactions, were involved, in which event separate counts would be proper for each distinct cause of action for which a separate recovery was sought.

In the instant case a single transaction is involved, the sale of the property by defendant to Hattie Host, and arising out of this transaction are the alternative claims of plaintiff and James Chase for a single commission. This is not a case where two separate and independent recoveries are claimed, and defendant is not called upon under the terms of count 3 to pay two commissions for the same transaction. It does not appear to this count, therefore, that the comments in Chicago Title & Trust Co. v. Guild, 323 Ill. App. 608, concerning liability to only one broker, and upon which statements defendant herein relies, are either relevant or determinative. Nor is the statement of law in American Jurisprudence, submitted by defendant, defining inconsistent causes of action, applicable, inasmuch as alternative rather than repugnant claims are presented herein.

Our conclusion that count 3 is legally sufficient is consistent, moreover, with the avowed purpose of the Civil Practice Act to simplify and consolidate litigation whenever it can be done without prejudice. (§175, §149, ch, 110, Ill. Rev. Stats.) The complaint herein presents a voluntary joinder of alternative claims which the court could compel to be joined on a bill of interpleader, (Chicago Title & Trust Co. v. Guild, supra.) and their joinder in one count neither violates the Civil Practice Act nor creates any ambiguities, nor prejudices any rights of defendant. Furthermore, to insist on the technicality of setting forth the alternative claims in separate counts would serve no useful purpose.

With reference to the issue of whether the trial court erred in concluding that plaintiff was entitled to the commission, it is fundamental that where a cause is tried without a jury, it is not the province of the appellate court to reweigh the evidence

unrelated causes of action, based upon different or [illegible], were involved, in which event separate counts could be pleaded for each distinct cause of action for which [illegible] was sought.

In the instant case a single transaction, [illegible] sale of the property by defendant to [illegible], and [illegible] of this transaction are the [illegible] of liability [illegible] damages claimed for a single commission. [illegible] two separate and independent [illegible] is not called upon under the [illegible] for the same transaction. [illegible] fore, that the contention in [illegible] Ill. App. 608, [illegible] which [illegible] determinative. [illegible] prudence, [illegible] of action, [illegible] claims are presented herein.

[illegible] moreover, with the [illegible] simplify and [illegible] pleadings. (§175, §176, ch. 110, Ill. Rev. Stat.) [illegible] herein presents a voluntary joinder of [illegible] the court could compel to be joined [illegible] (Chicago Title & Trust Co. v. Dodd, supra.) [illegible] one count neither violates the [illegible] ambiguities, nor pleadings [illegible] to insist on the technicality of [illegible] claims in separate counts would serve no useful purpose.

With reference to the issue of [illegible] in concluding that plaintiff was entitled to the commission, it is fundamental that where a cause is tried without a jury, it is not the province of the appellate court to reweigh the evidence

and substitute its judgment for that of the trial judge, who heard and saw the witnesses, unless it appears that its findings were manifestly against the weight of the evidence. (Pinkley v. Allied Oil Corp., 325 Ill. App. 326; Wharton v. Meyers, 371 Ill. 546).

To entitle an agent to a commission, it must appear that a sale is effected through his efforts or information derived from him. However, it is not necessary to establish that the agent introduced the purchaser to his principal. (Wright v. McClintock, 136 Ill. App. 438; Chicago Title & Trust Co. v. Guild, 329 Ill. App. 374).

In the recent case of Chicago Title & Trust Co. v. Guild, supra, a realtor was permitted to recover a commission from the owner where he had given the purchaser full details regarding the property and it appeared that he "was the one who produced in the mind of the purchaser the desire and intention to buy this property." As in the instant case, the purchaser there denied this fact, but the court stated that his conduct belied this contention.

In the instant case the evidence as to whether the plaintiff was the procuring cause of the sale is controverted, nevertheless, it appears that plaintiff, his salesman, and Chase were the only persons who had ever shown the property to Mrs. Host; that she did not contact defendant, Geister, until after she had been taken to the property and informed of its price and owner by plaintiff's salesman; that on November 8 plaintiff's salesman drove her to the property and stated that this is what she should buy, and discussed price with her; and that only two days before she signed the contract, she was in plaintiff's office and he urged her to buy this property.

Despite these circumstances, Mrs. Host contends that she became interested in the property through an ad in the paper, and thereafter discussed the terms of purchase with Mr. Geister

and substitute its judgment for that of the trial judge, who heard and saw the witnesses, unless it appears that the findings were manifestly against the weight of the evidence. (Pinkley v. Allied Oil Corp., 325 Ill. App. 326; Marston v. Meyers, 371 Ill. 546).

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In the instant case the evidence as to whether the plaintiff was the procuring cause of the sale is controverted, nevertheless, it appears that plaintiff, his salesman, and Chase were the only persons who had ever shown the property to Mrs. Hoot; that she did not contact defendant, Geister, until after she had been taken to the property and informed of its price and owner by plaintiff's salesman; that on November 6 plaintiff's salesman drove her to the property and stated that this is what she should buy, and discussed price with her; and that only two days before she signed the contract, she was in plaintiff's office and he urged her to buy this property.

Despite these circumstances, Mrs. Hoot contends that she became interested in the property through an ad in the paper, and thereafter discussed the terms of purchase with Mr. Geister

directly, apparently disregarding all conversation respecting the property which she had with plaintiff and his salesman during this same period.

In the light of this conflicting evidence it was incumbent upon the trial court to adjudge the credence to be given to the testimony of the witnesses, and inasmuch as the testimony of Mrs. Host was the only evidence offered by defendant, the court's finding that plaintiff was entitled to the commission is not only supported by evidence, but cannot be deemed to be manifestly against the weight of the evidence. The judgment entered by the trial court should therefore, be affirmed.

JUDGMENT AFFIRMED

directly, apparently disregarded all [illegible] the property which she had [illegible] during this same period.

In the light of this and other evidence [illegible] upon the trial court to reject the testimony of the witnesses, and [illegible] the trial court's finding [illegible] is not only [illegible] manifestly [illegible] entirely [illegible].

N. . 1019

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In the

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1938

337 I.A. 390

ARLIE J. CLARK, Plaintiff-Appellee, vs. ARTHUR E. GITTERMAN, Defendant-Appellant, MINNIE E. KELLER, Administratrix of the Estate of Thomas J. Keller, Deceased, Defendant-Appellee.	Appeal from Circuit Court of Peoria County. Trial below. Judge presiding.

CRISTOL, J. -- In [illegible] injuries and property [illegible] involving plaintiff Clark, the truck [illegible] decedent, and [illegible] Peoria County entered judgment [illegible] against plaintiff, Arlie J. Clark, [illegible] judgment defendant Gitterman [illegible]

The appeal presents the [illegible] sufficiency of plaintiff's [illegible]

the court's denial of defendant Gitterman's motion for a directed verdict, and judgment notwithstanding the verdict; and the legal merits of the court's rejection of a certain instruction offered by defendant, [illegible] direction, a verdict in favor of defendant Keller.

[1] Inasmuch as the cause [illegible] Gitterman's counsel [illegible] and industry, this court is con[illegible] in detail. Before proceeding, however, [illegible] that the abstract of the record [illegible] Gitterman's counsel [illegible] distortions of [illegible] argument, in violation of Rule [illegible] Court. (Zechman v. [illegible], 33 I. App. [illegible])

From the record it appears that [illegible] three miles east of Danville, Illinois, on October 3, 1943, at about 8:30 A. M. [illegible] his Buick in an eastbound direction [illegible], and immediately ahead of him, [illegible] the truck driven by [illegible] Drex, which, in turn, was preceded by plaintiff's truck. Defendant testified [illegible] the Drex truck which was travelling [illegible] and drew just behind plaintiff's truck [illegible], straddling the center line [illegible] of the road. From the [illegible] direction, [illegible] westerly toward plaintiff and defendant Gitterman, [illegible] trucks. The first [illegible] a Dr. Pepper truck [illegible] Jim Campbell, and it was follow[illegible] the Keller truck driven by the defendant Keller's decedent.

As the Dr. Pepper truck [illegible] plaintiff's truck, defendant Gitterman drew out from behind and passed both of plaintiff's truck at a speed of 50 miles per hour, even though defendant's visibility in the rear admittedly did not exceed

150 feet. As defendant [illegible] truck and the Dr. Pepper truck, [illegible] close that [illegible] plaintiff's [illegible], [illegible] driver of the Dr. Pepper truck, [illegible] to the right edge of the [illegible] line. The [illegible] apparently [illegible] just behind the Dr. Pepper truck, [illegible] slight [illegible] truck directly [illegible].

According to [illegible] [illegible] and intersection [illegible] through [illegible] truck. A [illegible] to the truck [illegible] defendant [illegible] the right front [illegible] K [illegible] out, and the [illegible] in the top of the [illegible] the truck finally [illegible] car struck the K[illegible] truck. [illegible] plaintiff's truck [illegible] plaintiff's [illegible] together and [illegible] facing in the direction [illegible] ing. [illegible] ment's car turn [illegible] left.

As a result of the collision, plaintiff, [illegible], had therefore been in [illegible] fracture of six ribs, a cut in [illegible] right [illegible], another cut [illegible] inch [illegible] eye, along with serious h[illegible] for eleven days, [illegible] and thereafter was restricted to light work. The [illegible]

doctor testified that he was unable to state whether plaintiff would recover from the [illegible] damage. In addition to the personal injuries, plaintiff [illegible] $736.[illegible] [illegible] truck. Defendant Ditterman [illegible] $[illegible] for the damage to his automobile.

At the close of plaintiff's evidence the defendant Ditterman and defendant [illegible] motions for directed verdicts, which motions were [illegible]. The motions were submitted at the close of all the evidence, and the court granted the motion of defendant [illegible], which plaintiff confessed, but denied the motion of defendant Ditterman. The jury returned a verdict finding defendant Ditterman guilty, and assessing damages to plaintiff in the sum of $[illegible], and in a separate verdict found plaintiff not guilty on the defendant Ditterman's counter claim.

The jury verdict for damages [illegible] in the amount of $1,25[illegible], which was the [illegible] paid to plaintiff by the administrator defendant, [illegible] not to sue, entered into after all the evidence was presented.

The circuit court [illegible] defendant Ditterman's motion for judgment notwithstanding the verdict [illegible], and entered judgment for $[illegible] [illegible] Ditterman is appealing from this judgment and from [illegible] the trial court's verdict in favor of the administrator defendant Kiser.

In an effort not to overlook any [illegible] the reversal, defendant Ditterman's counsel [illegible] seeks to attack the judgment on the grounds of [illegible], insufficient and improper evidence, [illegible] instructions, and prejudicial orders.

[2] Defendant contends that plaintiff's amended complaint does not comply with the requirements of the Civil Practice Act in that it merely states general allegations of negligence,

(Ill. Rev. Stat. 1947, ch. 110, par. 125, et seq.; Jones Ill. Stats. Ann. 104.001 et seq.)

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and that it [illegible] not [illegible] tion, in [illegible] it [illegible] truck, upon [illegible] permitted.

The [illegible]

[illegible] ((2), [illegible]

In [illegible] is necessary, [illegible] duty on the part of [illegible] duty, with resulting injury [illegible] (Cook [illegible] 238 Ill. [illegible]

In [illegible] and [illegible] vehicle [illegible]

Count 3 [illegible] and is not limited [illegible] tiff's truck. In [illegible] weather condition, [illegible]

[illegible]
truck and the Kil[illegible] truck, [illegible]
the K[illegible] truck [illegible]
with plaintiff's truck.

Count [illegible]
[illegible] defendant.

Count [illegible]
driving, [illegible]
line, [illegible] (Par. [illegible]
ch. 95, Ill. Rev. Stat. [illegible]
defendant Gillespie, [illegible]
with [illegible]
injuries. Count [illegible]
trial defendant. Count [illegible]
individually [illegible]
dangerous rate of [illegible]
(Sec. [illegible], ch. 95, Ill. Rev. Stat. [illegible]
that [illegible] continuing [illegible]
proximate cau[illegible]

In [illegible]
only [illegible]
the [illegible]
proximate [illegible]
but [illegible]
could be [illegible]
[illegible]
[illegible]
[illegible] injur[illegible]
duty, both [illegible]
[illegible] defendant Gillespie, [illegible]
[illegible] the center line [illegible]
plaintiff's truck and [illegible] K[illegible]
oncoming traffic [illegible]

[illegible]

[3] It is a contention [illegible], as defendant Cittermann's counsel has urged herein, that the acts complained of occurred after defendant passed plaintiff. Now as these counts merely allege general negligence, it would seem, therefore, that the argument [illegible] is legally insufficient [illegible] a tactical maneuver, and without [illegible] Mr. Justice Holmes in Grain, Ltd. v. Duff, 188 [illegible] 10, 12, [illegible] singularly appropriate.

> "Nowadays [illegible] guarded against [illegible] of [illegible] in suits."

[4] In determining [illegible] denial of defendant Cittermann's motion [illegible] which made a judgment [illegible] must view the evidence, and all [illegible] most favorably for plaintiff. (Ammerman v. City of W.I.A. [illegible], [illegible] Ill. App. 180, [illegible] Hedwig v. Lom Line, 320 Ill. App. 369, 378). If there is any [illegible] reasonable men may differ [illegible] and that such conduct [illegible] of the injuries to plaintiff, then [illegible] be sustained. (Orr v. Herzog, 327 Ill. App. 555).

The Illinois statutes [illegible] conduct for vehicle [illegible] provisions of Chapter 95½ [illegible] that no person shall drive a vehicle upon any public highway in this State at a speed greater than is reasonable and proper, having regard to the traffic and [illegible] to endanger the life or limb or property of any person, and that drivers are obliged to increase their speed when traffic hazards exist by reason of weather or highway conditions.

Section 155 of ch. 95½, provides:

> "No vehicle shall be driven to the left [illegible] of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free from oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completed safely without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. No vehicle shall be overtaken while [illegible] on the left-hand side of the roadway within 100 feet of any vehicle approaching in the opposite direction."

From the evidence [illegible], it [illegible] that defendant Gitterman, traveling behind the truck on a foggy morning, when virtually blind [illegible], first passed ahead of the Drew truck, [illegible] at 35 miles an hour, and then, after [illegible] for a short distance behind the plaintiff's truck [illegible] at 35 miles an hour, [illegible] the Drew truck and the Keller truck [illegible].

The negligent character of [illegible] evident from the fact that [illegible] dense fog the Dr. Pepper truck had [illegible] the driver had to forcefully apply his brakes and turn off to the right edge of the road to avoid a collision. [illegible] the driver and Drew, who was driving the truck [illegible], corroborated plaintiff's statement that defendant Gitterman barely managed to squeeze through between the Keller truck and the Dr. Pepper truck. The [illegible] apparent that Drew, traveling behind plaintiff, [illegible] applied his brakes to avoid piling up [illegible] Gitterman attempting to pass [illegible] in the face of the oncoming traffic.

There is no question but that [illegible] constituted a flagrant violation of the [illegible] statute as well as

common law standard [illegible] Kansas cases. [illegible] jarred plaintiff's [illegible] visible nor free from nothing [illegible] plaintiff without interference. [illegible] verdict [illegible] verdict in the instant case.

[5] The validity [illegible] negligence, (Alexander v. Indl. Sch. Dist. [illegible] v. Hill, 303 Ill. App. 381) but in the instant case [illegible] negligence was neither [illegible] with [illegible]. On the contrary, [illegible] in view of [illegible]. Moreover, violation [illegible] the [illegible] wilful [illegible] misconduct charge [illegible] (Leachtrup v. Donnell, 305 Ill. App. [illegible]).

[6-7] In the majority [illegible] stopped, or [illegible] by driving, and failed to [illegible] negligence. (See A.L.R. 317; 49 A.L.R. [illegible]; [illegible] A.L.R. [illegible], 31[illegible]; 104 A.L.R. 4[illegible]; [illegible] Hill [illegible] N.W. [illegible]; 22[illegible] 322, Devine v. Benton, 27 S.W. (2d) 3[illegible]) In addition to the precautions [illegible] common law duties [illegible] attempt to pass the car ahead when [illegible] obstructed. (32 A.L.R. 97[illegible]; Pilcher v. [illegible], [illegible] (2d) [illegible] 228 Ky. 35, 497).

According to the [illegible] however, the foregoing duties and [illegible] defendant are to be summarily [illegible]. From the interminable repetition in the record it appears that counsel had designated

the entire defense on the premise that defendant cannot be deemed negligent toward anyone since he was apparently able to get back to his side of the road a second before the crash occurred.

[8-9] It is our opinion that this fact is immaterial, determinative, for in seeking upon this technical point, counsel has overlooked the fundamental precept that drivers are accountable under the law for the personal and foreseeable consequences of their acts. Nor is it necessary that the precise consequences be foreseen. It is sufficient that they satisfy the requirements of the law if a reasonable man would foresee some danger or harm resulting from his conduct. Defendant's conduct herein started an evil impulse, a chain of events which culminated in injury to plaintiff.

More specifically, when the driver of the Kellar truck saw defendant coming toward him in the opposite lane of the highway, he applied his brakes and pulled to the right, undoubtedly causing the driver of the Kellar truck, who was just behind him to stop, and swerve to the left to avoid a head-on crash into him.

Q Collision 7-8 The driver of the Kellar truck is dead, and cannot testify to any allegations or testimony presented herein by defendant Gitterman; however, the physical circumstances, evidenced by the photographs introduced in evidence, and the testimony of eye witnesses, indicate that the Kellar truck had apparently stopped when it was struck by defendant Gitterman. For otherwise this heavy International truck could not have been spun around so completely by defendant's lighter car, nor hit with such an impact that the occupant was instantly killed, and one of the bodies thrown up onto the bank, and the other thrown into the ditch. For if it had been traveling at any speed, it

[illegible]

[illegible]

[10] [illegible]

[illegible]

[illegible]

In Devine v. B[illegible], [illegible]

[illegible]

[11] On the basis of [illegible] applicable rules of law, [illegible] presents sufficient evidence [illegible]

defendant Gitterman to sustain the orders of the circuit court denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict, and overruling the submission of the cause to the jury.

The arguments of defendant Gitterman's counsel with reference to the improper admission of testimony are too frivolous to merit the attention of the court. The circuit court exercised commendable judicial restraint in ruling upon the numerous technical objections interposed on behalf of defendant, and in admitting repetitious evidence which counsel deemed pertinent.

[12] The unnecessariness of the argument of counsel, as the court's refusal to submit defendant's instruction number 1 to the jury, is apparent from a fact that the court did submit to the jury with one instruction on behalf of plaintiff and 30 out of 32 instructions tendered by defendant Gitterman, emphasizing every phase of his theory of the case. The refused instruction could not, at most, have been cumulative, but by implication it informed the jury that defendant Gitterman was to be the sole cause of the collision before plaintiff could be entitled to recover, which is, obviously, not a correct statement of the law.

[13-14] Defendant Gitterman also takes exception to the trial court's order directing a verdict in favor of the cross-claim defendant Keller. It is recognized by the courts that although two defendants may be charged with negligence, it is not necessary to prove joint liability, and if the guilt of one of such defendants is proven to be the cause of plaintiff's injury, recovery against him alone is authorized. (Nachtrup v. Hensel, supra; Pierson v. Lyon & Healy, 243 Ill. 470.) It is not clear just now the recognition by the court that there was insufficient evidence against one defendant and the direction of a verdict

in his favor was prejudicial as a matter of law, or constituted reversible error against the other defendant. That defendant Gittermann may deem it to his interest and an actual advantage to retain a co-defendant in the cause in the judgment of the court, was in the light of the evidence [illegible] the administratrix defendant herein, and [illegible] in direction, a verdict in her favor.

[15] Furthermore, we find that [illegible] upon between counsel for the administratrix and plaintiff's counsel, who recognized the assumed [illegible] and been presented, [illegible] counsel suggested, [illegible] canon of ethics for attorneys at bar. In [illegible] this settlement [illegible] inasmuch as the court [illegible] $1250, the amount [illegible] settlement.

It is our opinion [illegible] all arguments [illegible] and judgments of the circuit court of Peoria County in this cause were without error, and the judgment of the court should properly be affirmed.

JUDGMENT AFFIRMED.

No. 10315

In the

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D. 1948

HOWARD MOORE, Plaintiff-Appellee, vs. WALTER LOCANDER, d/b/a Locander Roofing Company, Defendant-Appellant.	Appeal from the County Court of La Salle County. Honorable John J. Massieon, Judge Presiding.

BRISTOW, J. -- Plaintiff, Howard Moore, commenced proceedings in a Justice of Peace court to recover commissions on sales of roofing and siding jobs earned while he was in the employ of defendant, Walter Locander, d/b/a Locander Roofing Co. A judgment against defendant for $475 was entered therein, and on appeal, the county court, in a trial de novo, entered judgment on a jury verdict awarding plaintiff $500, from which judgment defendant appeals to this court.

The basic issues presented herein are whether an accord and satisfaction was entered into between the parties, of which this court can take cognizance, and whether defendant's motions for a directed verdict and a new trial, on the ground that there was no evidence of money due and owing to plaintiff, were improperly denied.

The salient facts are that plaintiff entered into an agreement with defendant, Walter Locander, whereby plaintiff was to solicit prospects for roofing and siding jobs, and where defendant concluded contracts therefrom, plaintiff was to receive 50% of the difference between the contract price and the base price which covered the cost of material, labor, transportation, and some profit on the material for defendant. Plaintiff was to receive a statement each month, however, he received only one statement, and that was after he had separated from his employment.

From his testimony of the jobs he solicited, their contract and base prices, the commissions earned and those actually received, it appears that he sold some 23 jobs, and that his total earnings were $1,591.18, of which he received $908.06, with the sum of $683.12 claimed to be still owing from defendant. Plaintiff asserted, moreover, that defendant made improper charges against certain jobs, and paid him less than the amount due or not at all on many of them.

Defendant testified that extra charges, where necessary for the completion of a job, were to be added to the base price and deducted from plaintiff's commissions, and that he paid plaintiff $943 although plaintiff was entitled to only $937.40.

Shortly after plaintiff separated from his job he asked defendant for an advance payment on jobs which he had solicited, but which were not yet completed. Before defendant would pay any sum he insisted that plaintiff sign a statement which defendant prepared, introduced herein as defendant's exhibit 16, on which were enumerated the various completed jobs solicited by plaintiff, their contract price, cost, and the commissions which defendant deemed plaintiff was entitled. There was also a notation on this exhibit of jobs to be laid, of certain errors, and a reference to "$50 advanced ch no. 468."

Plaintiff did not regard this exhibit as a correct statement of his earnings, but he needed the money and therefore signed it, whereupon he was paid a check for $50, introduced herein as defendant's exhibit 14, on which appeared the words "advance loan."

The salient facts are that plaintiff entered into an agreement with defendant, Walter Lozander, whereby plaintiff was to collect prospects for roofing and siding jobs. On which defendant concluded contracts therefrom, plaintiff was to receive 50% of the difference between the contract price and the base price which covered the cost of material, labor, transportation, and some profit on the material for defendant. Plaintiff was to receive a statement each month, however he received only one statement, and that was after he had to argue from his employment.

From his receiving of the jobs as plaintiff, with its terms and base prices, his commissions [illegible] plaintiff received, in aggregate for the [illegible] $2,[illegible], of which he received [illegible] [illegible] to be [illegible] under from defendant. Plaintiff contended, however, that defendant made improper charges against certain jobs, [illegible] than the amount due, or not at all on [illegible] of them.

Defendant established that extra [illegible], extra [illegible] for the completion of a job, were to be added to the base price [illegible] from plaintiff's commissions, [illegible] plaintiff [illegible] though plaintiff was entitled to only [illegible].

Shortly after plaintiff separated from his job as [illegible] defendant for an advance payment on jobs which [illegible] but [illegible] were not yet completed. Before defendant could [illegible] any [illegible] that plaintiff sign a statement which [illegible] presented, introduced herein as defendant's exhibit 1E, on which were [illegible] the various completed jobs solicited by plaintiff, [illegible] contract price, cost and the commissions which defendant [illegible] plaintiff was entitled. There was also a notation on this exhibit [illegible] to be [illegible], of course, errors, and a reference to "$50 advance on no. 48A."

Plaintiff did not regard this exhibit as a correct statement of his earnings, but he needed the money and therefore signed it, whereupon he was paid a check for $50, introduced herein as defendant's exhibit 1A, on which appeared the words "advance loan."

In support of his own assertions of his earnings, and in rebutting the accuracy of defendant's exhibit 16, plaintiff offered the customer's copy of the Hood contract, wherein the price of the job was designated as $303, whereas defendant's exhibit 16 indicated that it was only $250. Defendant's salesman, Kulpa, testifying on defendant's behalf, admitted that the Hood contract was for at least $270. One of defendant's former employees, who had worked on some of the jobs which plaintiff solicited, testified that only 8 packages of caulking cement were used on a particular job, as contrasted with the 50 gallons which defendant claimed were used, and for which he charged plaintiff.

On the basis of this conflicting evidence the county court submitted the cause to the jury and entered judgment on its verdict awarding plaintiff $500. Although 11 grounds for reversal are alleged, defendant has argued on this appeal only that the court erred in denying his motions for a directed verdict and for a new trial, on the ground that an accord and satisfaction was entered into between the parties.

Plaintiff contends that no such accord and satisfaction was entered, either intentionally, or by legal effect, and that this court cannot consider that issue, since it was not presented in the trial court, either in the instructions to the jury or in the motion for a new trial. Plaintiff argues, further, that there is ample evidence to support the court's denial of defendant's motions, and that as an additional ground for sustaining the judgment of the trial court, defendant failed to comply with the statutory requirements for perfecting appeals, in that no praecipe for record was served on plaintiff or his attorney, no proof of service of the praecipe was filed in the time designated, and that compliance with the statute does not appear in the abstract as specified in Rule 36 of the Supreme Court. (259.36, ch. 110, Ill. Rev. Stats. 1947.)

From the record it appears that the issue of accord and satisfaction was neither presented before the Justice of Peace court, nor in the county court either in the instructions, or in defendant's motion for a new trial. Nor was this issue assigned as an error for reversal.

In support of his own assertions of his earnings, and in rebutting the accuracy of defendant's exhibit 10, plaintiff offered the customer's copy of the food contract, wherein the price of the job was designated as $305, whereas defendant's exhibit 10 indicated that it was only $250. Defendant's salesman, Hye, testifying on defendant's behalf, admitted that the food contract was for at least $275. One of defendant's former employees, who had worked in some of the jobs which plaintiff solicited, testified that only 3 pounds of sealing cement were used on a particular job, as contrasted with the 5 gallons which defendant claimed were used, and for which he charged plaintiff.

On the basis of this conflicting evidence the county court submitted the cause to the jury and entered judgment on the verdict awarding plaintiff $300. Although 11 grounds for reversal are alleged, defendant has argued on this appeal only that the court erred in denying his motions for a directed verdict and for a new trial, on the ground that an accord and satisfaction was entered into between the parties.

Plaintiff contends that no such accord and satisfaction was entered, either intentionally, or by legal effect, and that this court cannot consider that issue, since it was not presented in the trial court, either in the instructions to the jury or in the motion for a new trial. Plaintiff argues, further, that there is ample evidence to support the court's denial of defendant's motions, and that on additional ground for sustaining the judgment of the trial court, defendant failed to comply with the statutory requirements for perfecting appeals, in that no praecipe for record was served on plaintiff or his attorney, no proof of service of the praecipe was filed in the time designated, and that compliance with the statute does not appear in the abstract as specified in Rule 36 of the Supreme Court. (Ill. Rev. Stats. 1947, ch. 110, 101.)

From the record it appears that the issue of accord and satisfaction was neither presented before the Justice of Peace court, nor in the county court either in the instructions, or in defendant's motion for a new trial. Nor was this issue assigned as an error for reversal.

It is established law that a court on review shall not take cognizance of any errors relied upon for reversal which were not presented in the trial court, or brought to the court's attention on the motion for a new trial. (Foley v. Excelsior Stove Mfg. Co., 265 Ill. App. 78, 96; McGovern v. City of Chicago, 202 Ill. App. 139, 144; Brown v. John L. Paraham Hat Co., 198 Ill. App. 623.) However, even if this court were to consider the issue of whether an accord and satisfaction was entered, a sound analysis of the facts would indicate that the parties did not intend that the check or defendant's exhibit 16 should constitute an accord and satisfaction, and that these exhibits do not comply with the legal requirements therefor.

To constitute an accord and satisfaction there must be a tender, understood by both parties that it is a payment in full of all demands, and the offer should be made in such a manner and accompanied by such declarations as amount to a condition that if the party takes it, he does so in satisfaction of his demand, notwithstanding any protests he may make to the contrary. (Adams, Inc. v. Astoria Box Co., 249 Ill. App. 174; Obermeyer v. Wis. Dairy Farms Co., 199 Ill. App. 568; Canton Coal Co. v. Paril, 215 Ill. 244.)

In Adams, Inc. v. Astoria Box Co., supra, in determining whether an accord and satisfaction was entered the court stated:

> "The accepting of a check by a lumber broker sent by his principal as payment of commissions on sales does not operate as an accord and satisfaction of the broker's larger demand, where it appears that there was no indorsement on the check that it was given in full settlement of the account, that there was nothing in a statement presented with the check to inform the broker it was in full settlement of his claim. . . ."

In the instant case, the check dated November 8, 1947, for $50, issued by defendant to plaintiff, bore the notation "advance loan," and there were no other words on it to indicate that it was given in full settlement of plaintiff's account, nor was there anything in defendant's exhibit 16, signed by plaintiff when he was given the check, which tended to indicate that acceptance of the check was in full settlement of plaintiff's commissions. On the contrary, there was the notation on the statement, "11-8-47 (50.00) advance loan Ck. No. 468," indicating that an advance payment had been made on the account.

It is established law that a court of review shall not take cognizance of any errors relied upon for reversal which were not presented in the trial court, or brought to the court's attention on the motion for a new trial. (Foley v. Metalsmith Corp. Co., 385 Ill. App. 77, 9; McGovern v. City of Chicago, 385 Ill. App. 124, 142; Brown v. Sears Roebuck Pat Co., 188 Ill. App. 636.) However, even if this court were to consider the issue of whether or not a second satisfaction was made, a sound analysis of the facts would indicate that the defendant did not intend that the check or check-stub exhibit be used constitute an accord and satisfaction, and that there exists no [illegible] under the legal requirements therefor.

To constitute an accord and satisfaction [illegible] a contract, understood by both parties that it is a payment in full of all demand, and the offer should be made in such a manner as [illegible] declarations as amount to a [illegible] that [illegible] does so in satisfaction of the claim. [illegible] may make to the contrary. [illegible] App. 174; [illegible] v. [illegible] Co., [illegible] Ill. App. 326; [illegible] Coal Co. v. [illegible], [illegible] Ill. [illegible].

In Adams, Inc. v. [illegible] Co., [illegible], [illegible] an accord and satisfaction was [illegible] as follows:

> "The acceptance of a check by a creditor [illegible] the principal as payment of a contract [illegible] operates as an accord and satisfaction [illegible] larger claim and. where it appears that [illegible] ment on the check that it was given in full settlement or the account, that there was nothing in [illegible] with the check to inform the creditor it was in full settlement of the claim. . . ."

In the instant case, the check dated November 8, 1947, [illegible] issued by defendant to plaintiff, [illegible] and there were no other words [illegible] full settlement of plaintiff's account. [illegible] defendant's exhibit 16, signed by plaintiff [illegible] which tended to indicate that [illegible] of the check was a full settlement of plaintiff's complaints. On the contrary, there was the notation on the state ment, "11-8-47 (30.00) advance [illegible] 436," indicating that an advance payment had been made on the account.

According to the Adams case, supra, the check and statement herein would be insufficient to establish an accord and satisfaction. Moreover, the avowed intention of the parties further militates against defendant's proposed interpretation. Plaintiff testified that he requested some money as an advance on jobs he had solicited, which were still incomplete, since he needed money, and defendant admitted, both in his testimony before the Justice of Peace, and in the trial court, that exhibit 16 was a statement of only the completed jobs, and that there were three unfinished jobs on which plaintiff sought a cash advance, which defendant paid after plaintiff signed the statement.

It is not clear to this court just how this transaction which the parties regarded as merely an advance payment, and which bears on its face evidence of that intention, could be construed as an accord and satisfaction, disposing of all claims for commissions arising out of the employment relation. Therefore, defendant's exhibits 14 and 16 must be considered along with other evidence in the cause in determining whether the court erred in denying defendant's motions, rather than as an accord and satisfaction conclusively determining the rights of the parties.

It is a fundamental precept that in reviewing the propriety of the denial of a motion for a directed verdict, the appellate court must consider the evidence most favorable to the plaintiff, and determine if there is any evidence fairly tending to support the complaint. (Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104; Mahan v. Richardson, 284 Ill. App. 493; Hunter v. Troup, 315 Ill. 293.)

In the case at bar plaintiff testified that he solicited some 23 roofing jobs on which defendant admittedly secured contracts, and plaintiff claims that under his employment agreement he was to get 50% of the difference between the contract and the base price for all jobs, which, he contends, after enumerating each transaction, amounted to $1,591.18, of which he received only $908.06. As of the date he left his employment he received no commission on 5 jobs, three of which were still incomplete. He stated, moreover, that he was paid short on many of the other jobs, where defendant either made improper charges against the contract price, as where he charged plaintiff with 50 gallons of

According to the [illegible] case, [illegible] would be insufficient to establish an [illegible] the proved intention of the parties [illegible] proposed interpretation. [illegible] money [illegible] since [illegible] before the [illegible] was a state [illegible] unfinished jobs [illegible] paid after plaintiff [illegible]

It is not [illegible] parties [illegible] face evidence of [illegible] [illegible] the employment [illegible] must be [illegible] [illegible] there is no [illegible] of his [illegible]

It is [illegible] the [illegible] consider the [illegible] there is [illegible] evidence [illegible] (Thompson v. [illegible] Johnson, 326 Ill. [illegible]

In the case at [illegible] [illegible] jobs on which [illegible] plaintiff claims [illegible] of the difference between [illegible] which, he contends, [illegible] $1,591.10, of which he received only $[illegible] his employment he received no [illegible] still incomplete. He stated, however, that [illegible] of the other jobs, where defendant either made [illegible] the contract price, as where he charged plaintiff with 50 gallons of

caulking material where only 8 packages were used; or defendant did not compute the correct price, as in the case of the Hood contract, where defendant's statement referred to the price as $250 and the customer's copy showed it to be $303. Plaintiff's testimony was substantiated, in a measure, by that of the witness, Pizutti, who had worked on some of the jobs which plaintiff solicited.

This evidence, however, is controverted by defendant's exhibits, and by his testimony that he paid plaintiff $943 which exceeded the amount due him. Defendant stated, furthermore, that under the agreement he could properly charge plaintiff with any extra expenses necessary for the completion of a job, in addition to the base price.

It is our judgment, upon a review of this record, that plaintiff submitted evidence from which the jury could find, without acting unreasonably, that the material averments of the complaint were substantiated. Therefore, the county court committed no error in denying defendant's motion for a directed verdict, and it was properly the province of the jury to weigh plaintiff's and defendant's conflicting testimony. Moreover, the determination of the trial judge who heard and saw the witnesses, that the jury's verdict was proper, should not be disturbed by this appellate court unless that verdict is manifestly against the weight of the evidence. (Horvat v. Opas, 315 Ill. App. 229; Dusatko v. Pletka, 329 Ill. App. 189.) In the instant case it does not appear that defendant's testimony and exhibits clearly and manifestly outweigh the evidence offered by plaintiff, and therefore the order denying the new trial was proper.

The constitutional guarantee of trial by jury is not, as defendant suggests, a device for inflicting hardship on the rich, from which a court must give protection. It is the duty of the court, in each instance, to submit the cause to the jury and abide by its judgment, according to the evidence presented.

Plaintiff has urged, as an additional reason for sustaining the judgment of the trial court, the fact that defendant has failed to perfect the appeal in accordance with the statute and the Rules of the Supreme Court.

caulking material were only 2 cordages were used; [illegible] the term die-cast compute the correct price, as in the case of the [illegible] contract, which defendant's statement referred to the price as [illegible] copy entered it to be [illegible]. Plaintiff's [illegible] testimony, in a measure, by that [illegible] of the jobs which plaintiff performed.

This evidence, [illegible] and by his testimony that [illegible] amount to [illegible] be a valid property [illegible] the construction of a job, in addition to the [illegible].

It is our judgment, upon a review [illegible] submitted evidence [illegible] summarily, that [illegible] defendant's [illegible]. Therefore, [illegible] defendant's [illegible] evidence of the jury [illegible] testimony. Moreover, [illegible] and cross-examined and cross-examined witnesses, [illegible] be clearly [illegible] against the [illegible] Dwaetko v. Hinton, 125 Ill. App. [illegible] appear that defendant's testimony and [illegible] outweigh the evidence offered [illegible] defendant [illegible].

The constitutional guarantee of [illegible] suggests, a device for [illegible] court must [illegible] inadequate, to [illegible] the cause to [illegible] according to the evidence presented.

Plaintiff has urged, as an additional reason for [illegible] the judgment of the trial court, the fact that defendant has failed to perfect the appeal in accordance with the statutes and the Rules of the Supreme Court.

Rule 36 (259.36, ch. 110, Ill. Rev. Stats.) provides:

> "(1) That Appellant must serve a copy of the praecipe upon Appellee or his Attorney; (2) Appellant must show proof of service of a copy upon Appellee or his Attorney; (3) Appellant must show that within ten days from the time he filed his notice of appeal with the Clerk of the Trial Court, that he filed a praecipe with said Clerk. That it is the duty of the Appellant to affirmatively show in abstract that he has complied with the provisions of the Statute, or this Court should enter an order sustaining the Judgment of the Trial Court."

In Peo. v. Chgo. Midland Ry. Co., 388 Ill. 325, the court held that it is the duty of the appellant to affirmatively show in the abstract that the praecipe for record was filed in due time, pursuant to Rule 36.

In the case at bar no copy of the praecipe for record was served upon plaintiff or his attorney; no proof of service of the copy was filed with the clerk of the trial court; and the abstract fails to show when defendant filed his praecipe, although, in fact, it was filed, not within 10 days as specified in the statute, but over 30 days from the time he filed his notice of appeal.

Under the aforementioned Rule 36, on the failure to affirmatively show compliance with the statute in the abstract, the reviewing court should enter an order sustaining the judgment of the trial court. Therefore, this court is constrained to hold that not only was the judgment of the county court free from error, but that the judgment entered therein should properly be affirmed on the further ground that defendant failed to comply with the statutory requirement for perfecting an appeal.

JUDGMENT AFFIRMED

Rule 36 (2B9.36, ch. 110, Ill. Rev. Stats.) provides:

> "(1) That Appellant must serve a copy of the praecipe upon Appellee or his Attorney; (2) Appellant must show proof of service of a copy upon Appellee or his Attorney; (3) Appellant must show that within ten days from the time he filed his notice of appeal with the Clerk of the Trial Court, that he filed a praecipe with said Clerk. That it is the duty of the Appellant to affirmatively show in abstract that he has complied with the provisions of the Statute, or this Court should enter an order sustaining the Judgment of the Trial Court."

In Fox, v. Chic. Lighting Co., 209 Ill. App. [illegible] the court held that it is the duty of the appellant to affirmatively show in his abstract or that the praecipe for record was filed [illegible] present to [illegible].

In the case at bar no copy of the praecipe was served upon plaintiff or his attorney; no proof of service of the copy was filed with the clerk of the trial court; [illegible] fails to show when defendant filed his praecipe, which is in fact, it was filed, not within 10 days as specified in the statute, but over 30 days from the time he filed his notice of appeal.

Under the aforementioned rule 36, on the failure to affirmatively show compliance with the statute in the abstract, the reviewing court should enter an order sustaining the judgment of the trial court. Therefore, this court is constrained to hold that not only was the judgment of the county court free from error, but that the judgment entered thereon should properly be affirmed. [illegible] ground that defendant failed to comply with the statutory requirements for perfecting an appeal.

JUDGMENT AFFIRMED.

O.K.

abstract

No. 10347

In the

APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D. 1949

MARY MURPHY, Plaintiff-Appellee,	Appeal from Circuit Court, Peoria County.
vs.	Honorable John T. Culbertson, Jr., Judge Presiding.
CHARLES L. WILKINS and CLARENCE CARMODY, Defendants-Appellants.	

BRISTOW, J. -- On September 28, 1947, at 1:00 A. M., the plaintiff Mary Murphy was riding in the right front seat of an automobile driven by a friend, Loman Smith. In the rear seat was another couple. The two couples had attended a dance that evening in Edelstein, Illinois. Thereafter they were driving south on Route 88, intending to come to Peoria, Illinois.

Charles L. Wilkins, the defendant, had spent that afternoon and evening at the Mt. Hawley Country Club, which is located a few miles north of Peoria. At the time of the accident he was driving his green Cadillac car south on Route 88. Following the Wilkins car was a car driven by Robert Bennett, and with him was a young lady who later became his wife. Then behind the Bennett

[illegible]

car was the Smith car in which the plaintiff was riding. Clarence Carmody with his wife was driving north on this same route. Immediately prior to the accident in question, the Smith car going at the rate of fifty miles an hour passed the Bennett car, and had just turned back on its right side of the pavement when the Wilkins car collided with the Carmody car causing the driver of the latter to lose control and veer over onto the west side of the pavement striking the car in which the plaintiff was riding and causing her serious injuries.

There was a complaint filed on behalf of plaintiff in two counts: first, charging defendant Wilkins with the negligence that caused her injuries and the second count charging Carmody with the negligence that occasioned the collision. In each of these counts the defendants were respectively charged with driving their automobiles to the left of the center line, causing each automobile to collide with the other. Each defendant filed answers denying any negligence on his part and admitting about everything else.

The jury found the defendant Wilkins guilty and assessed the plaintiff's damages at $27,500.00.

One of the principal objections urged by appellant on this appeal is that counsel for appellee performed too aggressively and was too eager to have paraded before the jury the fact that appellant's client was intoxicated and that he was a person of considerable importance, finding time to dine, drink, play golf and cards at the country club, and drive a new colorful Cadillac automobile.

The evidence shows very convincingly that Wilkins had been doing some drinking prior to the accident. He had spent the afternoon at the country club and there he had several drinks. He ate his dinner at the country club and played cards afterwards and admitted that between 10:30 P. M. and 12:30 A. M.,

car was the Smith car in which the plaintiff was riding. Clarence Darmody with his wife was driving north on this same route. Immediately prior to the accident in question, the Smith car going at the rate of fifty miles an hour passed the Darmody car, and had just turned back on its right side of the pavement when the Williams car collided with the Darmody car causing the driver of the latter to lose control and veer over onto the west side of the pavement striking the car in which the plaintiff was riding and causing her serious injuries.

Thereupon a complaint filed on behalf of plaintiff in two counts: first, charging defendant Williams with the negligence that caused her injuries, and the second count charging Darmody with the negligence that occasioned the collision. In each of these counts the defendants were respectively charged with driving their automobiles to the left of the center line, causing each automobile to collide with the other. Each defendant filed answers denying any negligence on his part and alleging about everything else.

The jury found the defendant Williams guilty and assessed the plaintiff's damages at $25,000.00.

One of the principal objections urged by appellant on this appeal is that counsel for appellee referred to the appellant and was too eager to have prejudice before the jury the fact that appellant's client was interested and that he was a member of considerable importance, finding time to play, golf, play golf and cards at the country club, and driving an colorful Duesenberg automobile.

The evidence shows very conclusively that Williams had been doing some drinking prior to the accident. He had spent the afternoon at the country club and there he had several drinks. He ate his dinner at the country club and played cards afterwards and admitted that between 10:30 P. M. and 12:30 A. M.,

the time of his departure, he had had several drinks of bourbon and water.

Robert Bennett, a disinterested witness, testified that the green Cadillac driven by Wilkins was proceeding in front of him on the morning in question, and was weaving all over the pavement; that on one occasion he was so far over on the wrong side of the pavement that he drove two automobiles into a ditch to avoid colliding with him. Loman Smith testified that the Wilkins car was over the center line on the east side of the highway at the time of the collision with Carmody.

Carmody, the other defendant, testified that Wilkins came over on his side of the pavement striking him and causing him to lose control of his car and consequently he veered over to the west side of the pavement striking head-on the car in which plaintiff was riding.

We are of the opinion that the trial court did not err in permitting appellee to submit proof of the behavior and activities of the defendant throughout the evening preceding the accident. Wilkins was loathe to admit how many drinks he had taken, but on pre trial deposition, he had admitted imbibing more freely than his testimony on the trial would indicate. His lack of frankness in this regard coupled with the proof that he drove very recklessly immediately prior to the accident, and the fact that defendant admitted on cross-examination that he might have been over the black line a little no doubt led the jury to the conclusion that defendant was not altogether sober at the time of the occurence.

Wilkins was only slightly injured. His doctor, Harold F. Diller, was called to his home between 1:00 and 2:00 A. M. on the morning of the accident. He testified that "as far as I could see he was sober." Herman Ruesch, a friend of Wilkins for eighteen years who lives near the scene of the accident testified that he saw defendant that night and talked with him

the time of his departure, he had [illegible] water.

Robert Bennett, a [illegible] that the press Gazette's [illegible] Wilkins was on [illegible] on the morning in question, [illegible] ment; that [illegible] of the [illegible] conflicts with his. [illegible] was over the [illegible] time of the [illegible]

[illegible] Wilkins [illegible] over in his [illegible] to [illegible] the [illegible] Wilkins [illegible] the [illegible] in the testimony [illegible] in this [illegible] immediately [illegible] stated on [illegible] black line a little [illegible] Bennett was not [illegible]

Wilkins was only [illegible] Gazette, [illegible] Gazette, [illegible] the morning of the accident. [illegible] as I could see [illegible] Wilkins [illegible] for eighteen years was [illegible] testified that he saw defendant [illegible] and talked with him

at the scene and his testimony was: "I would say Mr. Wilkins was sober."

Counsel for appellant protests bitterly against the propriety of Miss Murphy's counsel's argument to the jury. It is claimed that it was most prejudicial and inflammatory. It is true that counsel continually reminded the jury in no uncertain language that there are certain dangers attached to the driving of a high-powered Cadillac upon the highway in an intoxicated condition. Counsel did not neglect the importance of reminding the jury of Mr. Wilkins' activities--golf playing and a drink or two, dinner and another drink, card playing and four or five more drinks--all at the country club. Counsel for appellee also told the jury that his pretty client would never be pretty again; that because of the paralyzed nerves on the left side she would never smile again; that she would never be able to use the left side of her mouth in chewing food; and that all of this misery, suffering and wretched disfigurement was caused by the defendant's drunken driving.

We are of the view that every argument made by plaintiff counsel was supported by the evidence. Admittedly it was damaging, but there is no relief that we can extend. We cannot change the proof. The testimony clearly indicated that defendant was driving his car down the highway immediately preceding the accident in a careless fashion. He having admitted much drinking just prior thereto, the inference is irresistible that he had drunk too much. The evidence is overwhelming that defendant was on the wrong side of the paved highway when he collided with the Carmody car, and that he was the sole cause of the collision that resulted in plaintiff's injuries.

Mary Murphy was eighteen years of age at the time of the trial. She did not remember anything about the accident, being unconscious until the following Thursday evening. She was in a

at the scene and his testimony was: "I would say Mr. Hilvin was sober."

Counsel for appellant urgent are bitterly against the propriety of Mike Murphy's counsel's argument to the jury. It is alleged that it was not predicated and inflammatory. It is true that counsel continually referred to Hilvin in an unfavorable language that there was cause to believe with one in the driving of a high-powered Oldsmobile upon the highway in an intoxicated condition. Counsel did not imply the importance of persuading the jury to Mr. Hilvin's activities--only driving not a drink or two, liquor and another drink, some playing and "run or live" game drinking--all at the country club. Counsel for appellee also told the jury that his pretty client would never be pretty again because of the permanent scarring on the left side she would carry again; that she would never be able to use the left side of her mouth in smiling--in fact that all of life misery, and misery and unbelief disfigurement was caused by the defendant's improper driving.

We are of the view that every argument made by plaintiff's counsel was supported by the evidence. Admittedly it was inflaming, but there is no doubt that we are related. We cannot change the proof. The testimony clearly indicated that defendant was driving his car down the highway immediately preceding the accident in a careless fashion. He barely escaped much injury to the other thereto, the inference is irresistible that he had drunk too much. The evidence is overwhelming that defendant was on the wrong side of the paved highway when he collided with the Murphy car, and that he was the sole cause of the collision that resulted in plaintiff's injuries.

Mary Murphy was eighteen years of age at the time of the trial. She did not remember anything about the accident, being unconscious until the following Thursday evening. She was in a

critical condition throughout the earlier stages of her illness. It would require much space to detail all the testimony touching plaintiff's injuries, but since appellant insists that this verdict is excessive, we will point out a few of the disabilities that the evidence indisputably shows resulted from the accident. She was in a state of shock for several days; she suffered a broken jaw bone and intense pain in that area where a splint was placed; her left forehead was cut from the hair line down over her left eyelid; on the left forepart of her head another cut came down through her left eyebrow; and there was a cut that started at the top of her left ear and went down across her cheek to the center of her throat. These cuts cause pain when she is in a warm room or in the sunshine; she cannot close her left eye normally; the left side of her mouth does not function correctly; she cannot move the left side of her lower lip; she cannot chew on the left side; and there is a scar on her left knee which is tender. Miss Murphy's teeth were wired together and all of them were saved, the splint on her jaw remaining about three weeks. She was in the hospital two weeks and then taken to her home in Canton, Illinois, but for some time returned to Peoria for treatment once a week. The first time she was able to eat anything but soup, broth, etc. was three months after the accident. The pains from the injuries to her face are increasing and there is a continued feeling of numbness on the left side of her forehead. Miss Murphy was not able to continue her course of study at the University of Illinois, Under-graduate Division, at Galesburg because of her nervousness. Whenever she uses her eyes for close work, it causes her left eye to water and her vision to become blurred. Her teeth were badly chipped, and when she eats her jaws have an aching sensation. There was medical evidence that several of these conditions of ill-being are permanent. When she smiles the muscles on the left side of her face do not respond, thus causing a very awkward appearance. Her hospital,

critical condition throughout the earlier stages of her illness. It would require much space to detail all the testimony touching plaintiff's injuries, but since appellant insists that this verdict is excessive, we will point out a few of the disabilities that the evidence indisputably shows resulted from the accident. She was in a state of shock for several days; she suffered a bruised jaw bone and internal pain in the area where a rupture was already; her left forearm was cut [illegible] to the bone; over her left eyelid; on the left side of her head another cut came down through her left eyebrow; and there was a cut [illegible] the top of her left ear [illegible] center of her tongue. [illegible] warm room or in the sunshine; [illegible] normally; the left side of her mouth does not function correctly; she cannot move the left side [illegible] on the left side; and there is [illegible] on her left side is tender. Miss [illegible] [illegible] them were saved, the sight [illegible] weeks. She was in the hospital [illegible] home in Oregon, Illinois, but for [illegible] treatment once a week. The first time she was able [illegible] thing but soup, broth, etc. [illegible] The cause of the injuries to her face are [illegible] is a continued feeling of numbness on the left side of her face. Miss Murphy was not able to continue her course of study at the University of Illinois, [illegible] burg because of her nervousness. Whenever she uses her eyes for close work, it causes her left eye to ache and her vision to become blurred. Her teeth were badly chipped, and when she sets her jaws have an aching sensation. There was medical evidence that several of these conditions of ill-being are permanent. When she smiles the muscles on the left side of her face do not respond, thus causing a very awkward appearance. Her hospital,

nursing, medical and surgical expenses were in excess of $1,000.00. Dr. Richard O. Bauman was called to the hospital to see plaintiff at 2:30 A. M. the morning of the accident and quoting from the abstract his findings were as follows: "Mary was on the operating table in a state of shock and unconsciousness. Shock is the state manifested by a lowering of the blood pressure to the point where the blood does not move through the system, the pulse becomes hard to feel. The function of the heart is in a dubious state, and the threat of death is impending. As I looked at her my first impression was the state of loss of blood. She was white. She was tilted up on the table and they were trying to make her regain consciousness at that time, and the entire section of her face was laying wide open so I could see the bones, and even the muscles of the tongue beneath there. The ear was torn from its base, so that we could see the bones sticking out at the base of the skull, and this seemed to be a rather ragged sort of laceration, and the glass was still inside, ground into the wound. Above the left eye there was an extensive laceration which laid a section of the scalp and the forehead open, and exposed the bone and the nerves that come through a little hole right above the eye. I looked inside of her mouth and found that the tongue itself was torn from its socket, and the tissues inside the mouth had been separated from the gums, so that with a little encouragement I could separate what remained of the muscles and look clean through to the other side. Of course, the breaks in the jaw were evidence, and the jaw was hanging down in sort of a limp fashion. Looking over the rest of the situation, I saw these extensive abrasions, which were all over her body, and the laceration on the right leg, the right knee, the inner side, and the other knee, which was not extensive. The gland was wide open and shredded so that I could see that the nerves were exposed."

nursing, medical and surgical expenses were in excess of $1,000.00. Dr. Richard O. Beuren was called to the hospital to see plaintiff at 2:30 A. M. The morning of the accident and coming from the adjacent bile drainage were as follows: Lung was on the operating table in a state of shock and unconscious. Shock is the state manifested by a lowering of the blood pressure to the point where the blood does not move through the system, the pulse becomes hard to feel. The function of the heart is in a dubious state, and the result of hemorrhaging. As I looked at her my first impression was that she was [illegible] of loss of blood. She was unconscious. [illegible] on the [illegible] were trying to make her comfortable under anesthesia at that time, and the entire section of her face was hanging [illegible] the bones, and even the muscles of the tongue [illegible] were on burn from the [illegible] on the bone [illegible] out at the base of the [illegible] and that [illegible] sort of laceration, [illegible] the [illegible] skill [illegible], pushed into the wound. Upon [illegible] which left a [illegible] exposed the bone and [illegible] right above the [illegible] the tongue itself was [illegible] the mouth had been [illegible] unconsciousness I could [illegible] look clean through to the other side. Of course, [illegible] the jaw were [illegible] and the [illegible] ling fashion. Looking over the [illegible] these extensive abrasions, which were all over her body, and the laceration on the right leg, the right arm, the lower rib, and the other knee, which was not extensive. The [illegible] and abraded so that I could [illegible] the nerves were exposed."

In view of the foregoing we do not believe it is necessary for anyone to search for an authority to justify the jury's verdict of $27,500.00.

We have given careful consideration to all the assignments of error urged by appellant on this appeal, but we have found no merit in any of them. The testimony clearly shows that the plaintiff's injuries were the result of the defendant Wilkins' negligence. The verdict and judgment in this case represents substantial justice and should be affirmed.

JUDGMENT AFFIRMED.

In view of the foregoing we do not believe it is necessary for anyone to assume for an authority to justify the jury's verdict of $327,000.00.

We have given careful consideration to all the assignments of error urged by appellant in his brief, but we find no merit in any of them. The testimony clearly shows the plaintiff's intestate, the driver of the Datsun, was negligent. The verdict of the jury in favor of the plaintiff [illegible] be affirmed.

[illegible]

O. K.

Abstr...

Gen. No. 10333 Agenda No. 6

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

- - -

FEBRUARY TERM, A. D. 1949

- - - 337 I.A. 647

JOHN J. BOYLE, Plaintiff-Appellee VS RICHARD McGILL Defendant-Appellant ***** ELMER LINN Plaintiff-Appellee VS RICHARD McGILL and JOHN BOYLE Defendant-Appellant and Defendant-Appellee ***** ELMER LINN Plaintiff-Appellee VS RICHARD McGILL and JOHN BOYLE Defendant-Appellant and Defendant-Appellee	APPEAL FROM THE COUNTY COURT OF LA SALLE COUNTY

Dove, J.

On September 15, 1947 John Boyle commenced this action against Richard McGill before a Justice of the Peace, seeking to recover $235.25 damages to his automobile which

Gen. No. 10355 Docket No. 6

IN THE

APPELLATE COURT OF ILLINOIS

FOR THE DISTRICT

FEBRUARY TERM, A. D. 1949

JOHN J. BOYLE, Plaintiff-Appellee vs. RICHARD MOSHILL, Defendant-Appellant --- ELMER LINN, Plaintiff-Appellee vs. RICHARD MOSHILL and JOHN BOYLE, Defendant-Appellant and Defendant-Appellee --- ELMER LINN, Plaintiff-Appellee vs. RICHARD MOSHILL and JOHN BOYLE, Defendant-Appellant and Defendant-Appellee	

Dove, J.

On September 15, 1947 John Boyle commenced this action against Richard Moshill before a Justice of the Peace, seeking to recover $235.25 damages to his automobile which

he was driving on the early morning of June 29, 1947, and which became involved in an automobile collision. From a judgment in favor of the plaintiff, the defendant appealed to the County Court of LaSalle County.

On November 23, 1947, Elmer Linn commenced his action against the said John Boyle and Richard McGill, before a Justice of the Peace, to recover damages to his automobile which he claimed he sustained as a result of the same automobile collision. From a judgment rendered by the Justice of the Peace in favor of the plaintiff and against John Boyle alone for $250.00 and from a judgment rendered by the Justice of the Peace against the plaintiff and in favor of the defendant, Richard McGill, the plaintiff, Elmer Linn appealed to the county court of La Salle County and the defendant, John Boyle likewise perfected his appeal to the county court of LaSalle County.

In the county court, by agreement of the parties, the appeals were consolidated and the cases tried together, the issues being submitted to a jury. The jury returned a verdict finding the issues for John Boyle and against Richard McGill and assessing Boyle's damages at $235.25 and the jury also returned a verdict finding the issues for Elmer Linn and against Richard McGill and assessing Linn's damages at $305.00. A motion for a new trial having been overruled, judgments were rendered upon the respective verdicts and Richard McGill has perfected this appeal.

The evidence discloses that appellant is a truck driver employed by the National Tea Company. About one o'clock on Sunday morning, June 29, 1947 he and his wife came out of the Biltmore Tavern which is located about a mile west of

he was driving on the early morning of June 29, 1947, and which became involved in an automobile collision. From a judgment in favor of the plaintiff, the defendant appealed to the County Court of Lasalle County.

On November 22, 1947, Elmer Linn commenced his action against the said John Foyle and Richard Modill, before a justice of the peace, to recover damages to his automobile which he claimed he sustained as a result of the same automobile collision. From a judgment rendered by the justice of the peace in favor of the plaintiff and against John Foyle alone for $50.00 and from a judgment rendered by the justice of the peace against the plaintiff and in favor of the defendant, Richard Modill, the plaintiff, Elmer Linn appealed to the county court of Lasalle County and the defendant, John Foyle likewise perfected his appeal to the county court of Lasalle County.

In the county court, by agreement of the parties, the appeals were consolidated and the cause tried together, the issues being submitted to a jury. The jury returned a verdict finding the issues for John Foyle and against Richard Modill and assessing Foyle's damages at $255.25 and the jury also returned a verdict finding the issues for Elmer Linn and against Richard Modill and assessing Linn's damages at $300.00. A motion for a new trial having been overruled, judgments were rendered upon the respective verdicts and Richard Modill has perfected this appeal.

The evidence discloses that appellant is a truck driver employed by the National Tea Company. About one o'clock on Sunday morning, June 29, 1947 he and his wife came out of the Biltmore Tavern which is located about a mile west of

Ottawa on the south side of Route No. 6 which is a concrete paved highway. Mr. and Mrs. McGill entered their automobile which was parked in the driveway in front of the tavern facing northwest and Mr. McGill tried to start it. The car would not start and Mrs. McGill sought the assistance of an unknown person who was in a car to the rear of the McGill car. The unknown driver of this car pushed the rear bumpers of the McGill car with the front bumpers of his car and the McGill car moved out into the paved portion of Route 6. The bumpers of the two cars locked and the unknown driver of the car started to back his car, the effect of which was to pull the McGill car toward the south edge of the pavement. About this time, the defendant, John Boyle, Stanley Rosengreen, and two ladies were proceeding in an easterly direction toward Ottawa along Route 6 in a car being driven by John Boyle. It was raining and as they approached the Biltmore Tavern they were travelling about thirty-five miles per hour. Mr. Rosengreen testified that he was sitting in the back seat of the Boyle car and observed the McGill car as it was being pushed out of the Biltmore driveway on to the paved portion of Route 6. That this car proceeded across the south or east bound traffic lane until it was about half way to the center line of the pavement. At this time another automobile, driven by the plaintiff, Elmer Linn, was approaching the location of the Biltmore tavern from the east, travelling west on Route 6. A collision occurred. According to the testimony of Mr. Boyle his car first came in contact with the McGill car and then travelled twenty or twenty-two feet further and then hit the Linn car which was travelling in it's proper traffic lane.

Ottawa on the south side of Route 6. Orleans is a concrete paved highway. Mr. and Mrs. McGill entered this auto while which was parked in the driveway in front of the Bryson residence northwest and Mr. McGill said to Mrset M. The [illegible] stars and then, while alight the assistance of an unknown person who was in a car [illegible] McGill car. The unknown driver of this car [illegible] the McGill car with the front bumper of the car and the McGill car [illegible] out into the paved portion of Route 6. [illegible] on the [illegible] cars looked and the unknown driver [illegible] his car, the offend driver was to all the McGill car [illegible] the south edge of the pavement. About this time, the defendant John Doyle, Stanley Hopkins, [illegible] in an easterly direction towards [illegible] being driven by John Doyle. It was raining and as they approached the Gilmore Tavern they were travelling about thirty-five miles per hour. Mr. Hopkins testified that he was sitting in the back seat of the Doyle car and observed [illegible] being pushed out of the Gilmore driveway on to the paved portion of Route 6. That this car proceeded across the eastbound or west bound traffic lane until it was about half way to the centre line of the pavement. At this time another automobile, driven by the plaintiff, Elmer Lunn, was approaching the location of the Gilmore tavern from the east, travelling west on Route 6. A collision occurred. According to the testimony of Mr. Doyle his car first came in contact with the McGill car and then travelled twenty or twenty-two feet further and then hit the Lunn car which was travelling in Lt's proper traffic lane.

According to Mr. Rosengreen the Boyle car hit the McGill car and the Linn car about the same time. Mr. Boyle testified that the front end of the McGill car, at the time the Boyle car hit it was about two feet south of the black line marking the center of the pavement. According to the testimony of Mr. and Mrs. McGill, their car with the exception of one front wheel was completely off the pavement at the time of the collision. According to Mr. Linn the Boyle car travelled seventy five or one hundred feet after striking the McGill car before it struck his car.

Mr. McGill testified that when the bumpers of his car and the car that was pushing it locked, the front end of his (the McGill) car was in the middle of the pavement. That the car that was pushing the McGill car then started to back up, taking the McGill car to the south so that at the time it was struck by the Boyle car the greater portion of the McGill car was off the pavement. Both Mr. and Mrs. McGill were out of the car at that time and Mr. McGill testified that after the accident the unknown person who was pushing him "took off like a scared rabbit".

Counsel for appellant insists that the evidence discloses that appellant's automobile at no time came in contact with the automobile of Elmer Linn, that appellant was not guilty of any act which caused or contributed to cause the collision and that the verdict and judgment are contrary to the weight of the evidence. In this connection counsel argue that the person who contributed to the cause of the accident and the party really responsible therefor is the unknown person who pushed the McGill car on to the pavement and into the traffic lane of the Boyle car. Counsel argue that since the car of this unknown

According to Mr. Rosengreen, the Doyle car hit the Modill car and the Lion car about the same time. Mr. Doyle testified that the front end of the Modill car, at the time the Doyle car hit it was about six feet south of the block line crossing the center of the pavement. According to the testimony of Mr. Mrs. Modill, which was also the opinion of the trial court was completely off the pavement at the time of the collision. According to Mr. Lion the Doyle car travelled approximately five or one hundred feet after striking the Modill car before it stopped his car.

Mr. Modill testified that upon the impact of the car and the car that was driving it looked, the front end of the (the Modill) car was in the middle of the pavement. At the that car was pushing the Modill car that direction to south of the block line. Mrs. Modill was asleep by the Doyle car the greater portion of the Modill car was off the pavement. Both Mr. and Mrs. Modill were out of the car at that time and Mr. Modill testified that after he realized the unknown person was pushing the "[illegible]" he ran to the rabbit.

Counsel for appellant insists that the evidence disclosed that appellant's automobile at no time was in contact with the automobile of Lion Lion, that appellant was not guilty of any act which caused or contributed to cause the collision and that the verdict and judgment are contrary to the weight of the evidence. In this connection counsel argue that the person who contributed to the cause of the accident and the party really responsible therefor is the unknown person who pushed the Modill car on to the pavement and into the traffic lane of the Doyle car. Counsel argue that since the car of this unknown

person was pushing the McGill car on to the pavement "Richard McGill had no control over the movement of his car since his car was not the moving force."

This is an unusual argument in view of the evidence found in this record. Mr. McGill was in his car behind the steering wheel when Mrs. McGill, the wife of appellant, attracted the attention of this unknown person and without objection appellant permitted his car to be pushed onto the travelled portion of the highway and into the south or east bound lane of traffic. While the situation in which the parties hereto found themselves upon the occasion in question may be unusual, all the questions presented by this record are questions of fact and we are clearly of the opinion that the verdicts of the jury were warranted by the evidence and that substantial justice has resulted to the parties by the judgments rendered upon those verdicts.

There is no reversible error in this record and the judgments of the county court of LaSalle County will be affirmed.

Judgments affirmed.

person was pushing the McGill car on to the roadway "although McGill had no control over the movements of his car since his car was not the moving force."

This is an unusual argument in view of the evidence found in this record. Mr. McGill was in his car behind the stopping wheel when Mrs. McGill, the wife of a pedestrian, attempted the admission of this unknown person and without objection on appellant's position. In case no [illegible] only the lowered position of the driveway and into the [illegible] of that [illegible] traffic, while the situation in which the [illegible] found themselves upon the occasion [illegible] may be [illegible], in the question presented by this record are [illegible]. It is not we are clearly of the opinion that the verdicts of the jury were warranted by the evidence and that no [illegible] prejudicial error in the partial by the [illegible] [illegible].

There is no reversible error in this record and the judgments of the county court of [illegible] County, will be affirmed.

Judgments affirmed.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A.D. 1949

Term No. 49F16 Agenda No. 10

EMMA JENNINGS, Plaintiff-Appellee,	)	Appeal from the
-vs-	)	Circuit Court of
ALBERT DOUGLAS JENNINGS, Defendant-Appellant.	)	Alexander County.

CULBERTSON, P. J.

This is an appeal by ALBERT DOUGLAS JENNINGS (Defendant-Appellant, hereinafter called defendant) wherein he seeks to reverse an order of the Circuit Court of Alexander County, Illinois, overruling defendant's motion to vacate a decree entered on January 9, 1948, wherein EMMA JENNINGS, Plaintiff-Appellee (hereinafter called plaintiff), secured a divorce from defendant on the grounds of desertion.

It appears from the records in this case defendant signed an entry of appearance on November 29, 1947, and which said entry of appearance and the acknowledgment thereof, are, as follows:

"ENTRY OF APPEARANCE.

I hereby enter my appearance in the above entitled cause as defendant therein, and expressly waive the necessity of process of summons and consent that the same proceedings may be had therein, as fully and with the same force and effect as though I had been duly and regularly served with process of summons therein in the State of Illinois, at least thirty days prior to any return day designated by the plaintiff herein or as provided by law.

I further consent that immediate default may be taken and entered therein against me upon the filing of this appearance or at any time thereafter, and that an immediate hearing of said cause may be had without

further notice.

Dated this 29th day of November, A. D. 1947.

ALBERT DOUGLAS JENNINGS.

State of Illinois,)
) ss.
County of Alexander.)

I, Mildred McDaniel, notary public in and for said county and state, do hereby certify that Albert Douglas Jennings, personally known to me to be the same person whose name is subscribed to the foregoing waiver of summons, appeared before me this day in person and acknowledged that he signed said appearance as his free and voluntary act, for the purposes therein set forth.

Given under my hand and notarial seal, this 29th day of November, 1947.

Mildred McDaniel,
(Notarial Seal) Notary Public."

It also appears that on December 1, 1947, the plaintiff and the defendant herein entered into a certain stipulation, which said stipulation is as follows:

"STIPULATION

It is hereby agreed and stipulated between Emma Jennings, plaintiff, and Albert Douglas Jennings, defendant, parties to the above-entitled cause, that:

1. Said defendant will sign a written Entry of Appearance and thereby enter his written consent to the proceedings had in this cause.

2. Plaintiff will have the care and custody of their minor children, namely, Emma Clare Jennings, age 6 years, and Albert Douglas Jennings, Jr., age 7 years, and defendant will have the right to visit said children at all reasonable times.

3. Defendant will pay to plaintiff for the support and education of said minor children the sum of $175.00 per month.

4. The material portions of this stipulation will be incorporated into the Decree of Divorce when granted.

Dated this 1st day of December, 1947.

EMMA JENNINGS,
Plaintiff.

ALBERT DOUGLAS JENNINGS,
Defendant."

Plaintiff filed her complaint for divorce on January 7, 1948, together with defendant's entry of appearance and the

foregoing stipulation. The cause came on hearing on January 9, 1948, and a decree was entered on said date, by the terms of which plaintiff was divorced from the defendant, and was given the care and custody of the minor children of the marriage, with the right to defendant to visit them at all reasonable times, and the defendant was ordered to pay plaintiff the sum of $175.00 each month for the support and maintenance of said minor children. On February 7, 1948, defendant filed his verified motion to vacate the decree entered on January 9, 1948, and which said motion contains some twenty-one paragraphs setting forth various reasons why the decree should be vacated. The three points relied upon for reversal in this Court in defendant's brief may be fairly summarized as follows: (1) The entry of appearance did not confer jurisdiction on the Court of the person of the defendant; (2) The decree should have been vacated because of collusion of the parties; and (3) The Court abused its discretion in refusing to vacate the decree.

We have examined with great care the authorities cited by defendant in support of his first contention, and we do not believe they furnish support for the contention. On the contrary, an examination of the entry of appearance signed by defendant, discloses it is very similar to the one held valid in the case of LAFETTE vs. MYERS, 303 Ill. 582. We know of no authority in this State that holds that a defendant who is of full age and under no disability cannot, by a proper entry of appearance, submit himself to the jurisdiction of the Court by way of entry of appearance.

As to the second contention advanced by defendant, that the decree should have been vacated on the ground of collusion, a careful inspection of this record does not disclose any charge of collusion as between the parties to this litigation. It is true, the motion to set aside the decree contains the statement that the defendant believes he has been

guilty of collusion, but it contains no assertion that the plaintiff was guilty of any collusion. Collusion must have the participation of more than one person.

Paragraph 7 of Section 50 of the Civil Practice Act, ILLINOIS REVISED STATUTES, 1947, Chapter 110, Section 174, provides that the Court may, in its discretion, before the final judgment, set aside any default, and may, within thirty days after the entry thereof, set aside any judgment or decree, upon good cause shown by affidavit, and while defendant urges in this Court that there was an abuse of discretion on the part of the Chancellor who heard this matter and determined it, we must conclude from a careful examination of the record in this case that it fails to disclose any abuse of discretion on the part of the Chancellor of which this Court should take cognizance to the extent of a reversal.

The action of the Chancellor in refusing to set aside the decree entered by him on January 9, 1948 was, in the opinion of this Court, fully warranted, and is, accordingly, affirmed.

Affirmed.

Bardens, J., and Scheineman, J., concur.

(Abstract)

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1949

Term No. 49F7 Agenda No. 5

ROBERT H. HOLMES, Plaintiff-Appellant, -vs- FLORENCE GARRETT HOLMES, Defendant-Appellee.	Appeal from the Circuit Court of Saline County, Illinois.

BARDENS, J.,

On February 17, 1948, Robert H. Holmes, Appellant, filed divorce proceedings against his wife, Florence Garrett Holmes, Appellee herein. Appellant alleged that his wife was guilty of desertion and that she had obtained jewelry from him through fraudulent practices. A jury trial was requested by the Appellant. An answer and counterclaim was filed by Appellee. Appellant then filed a motion to strike Appellee's answer, which motion was denied. After Appellant filed an answer to Appellee's counterclaim, on April 21, 1948, the case proceeded to trial and evidence was introduced before a jury. At six P.M. of that day, before all evidence was closed, the Court, thinking the jury was advisory only, took the case from the jury and made the following docket entries:

"***the Court takes the case from the jury, and being fully advised in the premises, enters the following decree and judgment, viz.:

Finds the Defendant guilty of desertion without legal cause.

Finds Defendant has expended considerable money at the Plaintiff's fault.

Finds Defendant entitled to attorney fees and expenses.

It is THEREFORE ADJUDGED AND DECREED that a divorce be entered at Defendant's fault on desertion."

"***That the Plaintiff pay Defendant $150.00 for return of money expended without her fault; and $150.00 for expenses incurred because of this law suit and the further sum of $250.00 as per reasonable attorney's fees.

It is further decreed that the Defendant return to the Plaintiff an engagement ring (which the Court finds to have been a gift to the Defendant) upon the Plaintiff depositing with the Clerk for the Defendant the sum of $150.00 within thirty days of this date for the value thereof." No formal order was signed or approved by the Court at that time.

A motion to amend the findings made on April 21, 1948, was filed by the Appellant on May 18, 1948. On June 8, 1948, a formal decree in accord with the docket entries of April 21 (except it provided Plaintiff pay $50.00 instead of $150.00 for expenses of suit) was presented to the Court which said order was signed and approved by the Court on that date. This order was entered of record June 9, 1948. June 14, 1948, the Appellant filed his Notice of Appeal in words and figures as follows:

"Please take Notice that Plaintiff in the above entitled cause hereby appeals to the Appellate Court, Fourth District of Illinois, from part of decree rendered and entered in the Saline County Circuit Court of Illinois on the 21st day of April, 1948, which decree--

Took from the jury the question of fraud,

Ordered plaintiff to pay to the defendant,

$150.00 for clothing,
50.00 for expense attending trial,
150.00 for certain jewelry,
250.00 for defendant's attorney fees.

wherefore plaintiff prays that said portion of said decree ordering payments to the defendant be reversed and for

naught held, and said cause remanded and ordered the question of fraud be submitted to a jury."

Appellee filed her Notice of Cross Appeal on June 24, 1948, as follows:

"***Defendant prays that the Decree of Divorce entered June 9th, 1948, be reversed, annulled, set aside and wholly for nothing esteemed and that the cause be remanded to the trial court for a new trial."

Initially, it should be observed that the Appellant has appealed from a portion of the decree rendered April 21st when, in fact, on that date only the docket entries quoted above were entered by the Judge. Such docket entries do not constitute a final judgment reviewable by this Court, People vs. New York Cent. R. Company, 391 Ill. 377 and cases cited. However, we are disposed to call this error of Appellant's Notice of Appeal one of form rather than substance. A final judgment in accord with the docket entries of April 21st was entered June 9, 1948, prior to Appellant's filing his Notice of Appeal. Such Appeal did advise Appellee of that portion of the judgment complained of and that Appellant desired this case to be reviewed by a higher tribunal. Appellee was not prejudiced. This was a sufficient substantial compliance with Rule 33 of the Supreme Court. Luner vs. Gelles, 314 Ill. App. 659; People vs. New York Cent. R. Company supra and cases cited.

Since this is construed to be an appeal from the final judgment recorded June 9, 1948, the Cross Appeal of the Appellee must be granted in that the lower Court erred in taking the question of desertion from the jury. The entire record shows that this action of the lower court was performed with the mistaken conception that the jury was advisory only. Nor was it the court's intention to enter a directed verdict. By its order of June 15, 1948, fixing the appeal bond, the lower court recognized it had committed error and was willing

to set aside its former decree if the parties agreed. However, by filing his Notice of Appeal, June 14, Appellee perfected his appeal and this Court has no jurisdiction to review this subsequent order of the lower court. M. A. Wolcott et al. vs. The Village of Lombard et al., 387 Ill. 621; Cowdery vs. Northern Trust Co., 321 Ill. App. 243.

On November 18, 1948, after a hearing upon a subsequent petition filed by the Appellee under Section 15 of an Act entitled, "An Act to revise the law in relation to divorce" (Ill. Rev. Stat. 1947, Chap. 40, Para. 16), the lower court ordered Appellant to pay into Court for the use of the Appellee, $150.00 for Appellee's appeal costs, and the further sum of $300.00 as partial attorney fees for the appeal. Sometime before December 30, 1948, Appellant filed an amended notice of appeal from said order of November 18, 1948, which Appellee has moved to dismiss. While amendments to the notice of Appeal are permitted, they relate back to the time of the filing of the original Notice of Appeal and can not therefore include any order entered subsequent to the date of the filing of the original notice. Appellant is here seeking a review of a subsequent order which could not be included in an Amended Notice of Appeal. Furthermore, this Amended Notice of Appeal was filed more than ninety days after the filing of the original Notice, contrary to said Rule 33.

The Decree of the Circuit Court of Saline County filed June 9, 1948, is hereby reversed and the case is remanded for new trial. The proceedings pursuant to the amended notice of appeal from the order of November 18, 1948, are hereby dismissed.

Culbertson, P. J. and Scheineman, J. concur.

(Publish abstract only)

In the

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

February Term A. D. 1949

Term No. 49F22 Agenda No. 7

LETHA B. AKIN, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Williamson County, Illinois.
-vs-	)	
KENNETH JACK AKIN, Defendant-Appellee.	)	The Honorable C. Ross Reynolds, Judge Presiding.

Scheineman, J.

On January 25, 1947, the Plaintiff, Letha B. Akin, secured a divorce from defendant, Kenneth Jack Akin, and was awarded custody of their two male children, aged 22 months and 5 months, respectively. The defendant was allowed the right of visitation, and was ordered to pay plaintiff $80.00 per month for the support of the children. Six months later, pursuant to defendant's petition, the decree was modified to make the visitation privileges specific. By this order the defendant was permitted to take the older boy to his home on every sixth Saturday, keeping him not longer than three hours, and to visit the younger child for a few minutes on the occasion of these Saturday trips. It was further provided that after two years, the younger child might be taken as well as the older.

On December 30, 1948, the court again modified the decree with respect to visitation privileges, pursuant to hearing upon defendant's petition and plaintiff's counter-petition. By this order, defendant was permitted to take the

older boy (aged nearly four years) to his home on every third Saturday at 9 A.M. and return him the next day at 5 P.M. He was also permitted to take the younger boy on both said days, every third week, between the hours of 9 A.M. and 5 P.M. but not to keep him over night. This child was then aged two years.

The plaintiff has appealed from this last order, and seeks reversal thereof upon the following grounds: (1) That defendant failed to pay the monthly installments for support during the months of August, September and October, 1947; that thereafter he paid the subsequent installments but did not make up the delinquency; that he was still in default as to these payments and therefore did not come into court with clean hands, and the court should have denied his petition for that reason alone. (2) That there was not shown any change in conditions justifying a change in the previous order in any event. (3) That the court erred in denying the counter petition for an increased allowance per month, since the cost of living had gone up in the interim. (4) That the court erred in allowing an inadequate amount for plaintiff's attorneys' fees on this last hearing, in the sum of $50.00.

As to the first contention, the court found that the non-payment of $240.00 for the three months "was not a wilful and contumacious disobedience but was due to the misfortune of his sickness". This finding is supported by uncontradicted testimony that defendant was ill and in the hospital for three months beginning in July 1947. The court further directed defendant to pay up the arrears. This finding and order were correct under the circumstances. Where a default is not wilful, but is excusable, the court may properly hear a petition to modify a decree in behalf of the party in default. If this were not the law, then in all cases, no matter what the excuse, "the court would be powerless to grant relief as to future and further alimony, no matter what the changed condition of the parties or the property or how loudly the facts

and circumstances might call for equitable intervention of the court. The hands of a court of equity are not thus bound." Craig vs. Craig, 163 Ill. 176.

On the second point, it would seem that plaintiff's animosity toward defendant may well make it difficult and perhaps impractical for him to visit in her home. Moreover, the plaintiff has recently married a man of long acquaintance with the defendant, and the latter has found the situation embarrassing. The chancellor considered this re-marriage in revising the decree, and this was proper. 27 C.J.S. 1192.

The original decree expressly provided that defendant should have visitation rights. Antagonism between the parents made it necessary for the court to prescribe the conditions and limitations in minute detail, but the result did not accord to defendant the right to visit his children at reasonable times. He was permitted to see them only at intervals of six weeks, and then only for three hours with the older boy, and but a few minutes with the younger. Under this extreme restriction, the children could hardly know their father, and the evidence shows this was the fact. Yet, the chancellor could not then do much else, under the conditions, since considerations of the children's welfare and health precluded frequent or extensive deviations from their daily routine, during infancy.

These considerations naturally and inevitable diminish and even disappear in time, and the chancellor must be allowed a broad discretion in adjusting the order to promote the best interests of the children as they progress in age, physique and understanding. 27 C.J.S. 1172.

The defendant appears to be interested in his sons, and is paying for their support. It is surely proper for the chancellor to endeavor to preserve and maintain for them the interest and affection of their father, in spite of objections from the mother, there being nothing in the evidence to indicate

that the father's influence would be bad. Always in custody problems, the primary consideration is the best interest of the children, Buehler vs. Buehler, 373 Ill. 626. The record indidates this has been the objective of the chancellor, and this court will not rule that he must adhere to one arrangement indefinitely, when the reasons therefor are disappearing or no longer exist.

As to the counter-petition for an increase in the monthly payments, this was not supported by any evidence of a change in condition of the parties financially. It was argued that the court should take judicial notice of an increase in the cost of living. The interval was not long, and minor fluctuations in prices in either direction may occur constantly without materially changing the general situation. The chancellor's finding that there had been no material change in conditions to justify altering this part of the order, appears in conformity with the record before this court.

Plaintiff was allowed $100.00 attorneys' fees on the original hearing, an additional $50.00 six months later when the decree was made more specific, and an additional $50.00 now in resisting the entering of this last order. No evidence was adduced on this matter, and the court used its discretion in fixing this amount. Plaintiff's counsel have diligently presented her contentions upon the hearing, but there does not appear to have been much merit in them, and certainly there is nothing in the record before us pointing to an abuse of the discretion accorded a trial court in the allowance of attorneys' fees. Blake vs. Blake 80 Ill. 523.

The modification decree appealed from is hereby affirmed.

Decree Affirmed.

Culbertson, P. J. and Bardens, J. concur.

(Publish Abstract only)

44414

CITY OF CHICAGO, Appellee,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
MELVIN BERNSTEIN, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint against defendant for the alleged violation of two sections of the Municipal Code of Chicago. Trial by the court without a jury resulted in a finding against the defendant as to both sections, and a judgment fine of $25.00 for each violation, from which defendant appeals.

Upon the hearing it was stipulated between the parties that the facts in the case are as follows: "The defendant is a used-car dealer duly licensed by the State of Illinois, having license No. 2565. In the month of March 1943 he became a tenant of the premises located at 2118-22 N. Cicero Avenue, Chicago, Illinois. Prior to his tenancy the premises consisted of a vacant parcel of land that had been used as a dump-yard and all sorts of debris and garbage was strewn thereon. Upon becoming a tenant the defendant cleared land, leveled it off and erected thereon a building 16 feet wide by 24 feet long and 20 feet high of one story in height of wood, with plastered walls, the exterior wall is of wood siding, the structural members are of wood, the roof structure and joist are of wood, the roof sheathing is of wood, the roof is covered with tar paper, and there is no partition. The balance of the premises is used for the open-air dis-

play of used cars. The structure was designed to be used as an office and has been so used from the time it was erected to the present time. The nearest property to this office buildingis a brick building some 35 or 40 feet away, on adjoining land."

The ordinances involved are as follows: "50-8. Ordinary construction or a superior type of construction, shall be used for any business unit fifty feet or less in height; provided however that in every business unit more than two stories high, if of ordinary construction, ceilings and partitions shall be covered with metal lath and plaster; and provided further, that in every business unit not more than two stories high, if of ordinary construction, partitions shall be, and ceilings may be, covered with material equal in fire resistive value to wood lath and plaster. 67-59. No building, structure, shed, or enclosure of wood frame construction shall be erected inside the fire limits, or provisional fire limits, except as permitted for a specified use under the occupancy chapters in the building provisions of this code and except for a period of two years from the passage of an ordinance for the construction of dwellings designed to meet the housing shortage, provided such construction meets the provisions of the Chicago Emergency Housing Code passed March 14, 1946, and except as provided by chapter 60.1 of this code."

Defendant seeks to challenge the sufficiency of the complaint and the validity of these ordinances on various grounds. He argues that plaintiff as a municipal corporation had no power to enact the ordinances; that they are void be-

cause they are uncertain; that they make an illegal classification, and grant illegal authority to administrative officers, or are unreasonable. No pleadings were filed by defendant, nor did he make any motions to strike the complaint on any of these grounds. There being no dispute as to the evidence, the sole issue presented and decided by the court was the application to the stipulated facts of the ordinances claimed to have been violated by defendant; a determination of their validity was not involved, and, in fact, no objection was made to the validity of the ordinances when they were offered in evidence. A similar situation arose in Village of Riverside v. Kuhne, 397 Ill. 108. In that proceeding no objection was made to any evidence, nor was any question presented, either in the pleadings or upon trial, that required the court to pass upon the validity of the ordinance; at no time prior to judgment did defendant raise any question as to the validity of the ordinance. In commenting on these circumstances the court said: "The validity of the ordinance might have been involved in this suit had the defendant objected to the admission of the ordinance in evidence, and to the admission of any evidence under it, at the same time preserving the question for review by obtaining a ruling of the court on his objection. (Pearson v. Zehr, 125 Ill. 573.) The right to question the validity of a statute or ordinance may be waived either by act or omission. (Jenisek v. Riggs, 381 Ill. 290.) The general rule is, that it is the duty of a person, whenever he regards his constitutional right as invaded, to raise an objection at the earliest fair opportunity and the failure

to do so amounts to a waiver of the right." The defendant in that case proceeded on the theory that the ordinance was valid but did not apply to him. The defendant in the case at bar evidently proceeded on the same theory. He now seeks on appeal, for the first time, to attack the validity of these ordinances after judgment has been rendered against him. Under like circumstances the court in the Village of Riverside case held that "defendant waived his right to question the validity of the zoning ordinance," citing Jenisek v. Riggs, supra, and Comrs. of Drainage Dist. v. Smith, 233 Ill. 417. City of Litchfield v. Hart, 306 Ill. App. 621, was a prosecution for violation of an ordinance, as in the case at bar. There, too, a jury was waived and the facts were stipulated. The reviewing court held that it was too late on appeal to raise, for the first time, the sufficiency of the complaint and the warrant, saying: "The entering into the stipulation by appellant waived any defect there might be in the complaint." We think that under the rule announced in these decisions, defendant here is precluded from now urging the invalidity of these ordinances."

The remaining ground urged for reversal is that sections 50-8 and 67-59 "do not apply to the *** premises." Defendant argues that the term "ordinary construction" is a general one that "does not have a well-established and understood meaning," and "as a matter of fact, it is doubted if two reasonable minds would agree on what is included in the general language. To say the least, the term is ambiguous and doubtful in meaning"; and because

of this claimed ambiguity or doubt it is urged that resort must be had to the "contemporary construction placed on this section of the code." The argument supporting this theory is predicated on the assumption that the "city officials who have the duty of enforcing the ordinance were aware of the existence of the structure and that they must have concluded that there was no violation of the ordinances." The rule of contemporaneous and practical interpretation of a statute is recognized in law as affording aid in determining the meaning of a doubtful statute, and there is considerable authority dealing with the subject. It is somewhat analogous to the principle of estoppel running against the government, but is not invoked except under special circumstances which would make it highly inequitable or oppressive to enforce the public right sought. (People v. Thomas, 361 Ill. 448.) In the case at bar there is not a single statement or deed by any city official construing the use of the premises nor any evidence to which the doctrine could be applied. Counsel suggest that the city's failure to prosecute defendant from the time the structure was built in 1943 until this proceeding was filed in 1947, should be interpreted as establishing the right of defendant to maintain an improper occupancy use of the premises. Even if it could be assumed that the city had knowledge of defendant's violation (although there is no evidence of that fact), the negligence of the city conferred no right on defendant to disregard its ordinances. Kadgihn v. City of Bloomington, 58 Ill. 229. In People v. Thomas, supra, the court said that the

doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, but that mere nonaction is not sufficient to work an estoppel, since the question is not to be decided by the mere lapse of time but by all the circumstances of the case. See also People v. Woods, 354 Ill. 224, and Trustees of Schools v. American Surety Co., 307 Ill. App. 398.

The claimed ambiguity of these ordinances arises from an attempt to isolate them from other sections of the Building Provisions of the Municipal Code. When read in connection with sections 39-1 and 39-2 they are shown to be part of a comprehensive, integrated and understandable code designed as an important means of protecting the public health, safety, comfort and welfare.

Section 89-1 of the code provides that "no building, structure, shed or enclosure of wood frame construction shall be erected inside the fire limits or provisional fire limits, except as provided in section 67-59 in the building provisions of this code. Within the provisional fire limits of the city it shall be lawful to erect a building of wood frame construction to be used for residence or mercantile purposes upon approval by the commissioner of buildings of a petition presented together with a plat, plans, and specifications showing the space where such building is to be erected. Such petition shall be

verified by the affidavit of the applicant and shall contain the written consent of the owners of a majority of the frontage upon both sides of the streets surrounding the square in which the proposed building is to be erected. No such petition shall be required, however, for the erection within the provisional fire limits of frame buildings of the type permitted by section 47-4 in the building provisions of this code. No residence or mercantile building of wood frame construction shall be erected within the provisional fire limits exceeding thirty feet in height." The foregoing provision explains the operation of section 67-59, and the origin of the so-called "fire limits." Defendant attaches to his brief a sectional map of the City of Chicago showing that the premises involved are within the absolute fire limits of the city.

With respect to the type of building erected by defendant, section 52-10 provides as follows: "Class 2 garages, not more than four hundred square feet in area may be of wood frame or more fire-resistive type of construction, except that the floor thereof shall be of non-combustile material. Class 2 garages more than four hundred square feet in area shall be of ordinary construction or a more fire-resistive type of construction, except that the floor thereof shall be of non-combustible material." Defendant was undoubtedly familiar with this section because he predicated upon it his request for a permit to build the structure in question. He obtained a permit to build a frame garage twenty feet by twenty

feet, but instead he erected a different type of building—a one-story wooden structure sixteen feet wide, twenty-four feet long and twenty feet high—which he used as an office rather than as a garage. If he had constructed the building called for in the permit and put it to the use which the permit allowed, he would not have violated sections 50-8 and 67-59. Since the wooden structure constructed by him was within the fire limits, its use as an office constituted a violation of the ordinance. The present fire-limits law was enacted in 1941 (Ill. Rev. Stat. 1947, ch. 24, par. 23—71), and the power of the city to regulate the construction and use of buildings under a similar statute was upheld in County of Cook v. City of Chicago, 311 Ill. 234. The ordinances in question are designed for fire protection and public safety, and in order to accomplish their purpose they must be rigidly enforced. Fire protection is a necessary governmental service, and ordinances enacted in furtherance thereof should be upheld.

We think the court properly held that defendant violated two valid city ordinances; therefore the judgment should be affirmed, and it is so ordered.

Judgment affirmed.

Sullivan, P. J., and Scanlan, J., concur.

44446

THEODORE A. KOLB, Appellee, v. DOROTHY GABL and ALBERT J. HORAN, Individually and as Bailiff of the Municipal Court of Chicago, Defendants, and HELEN A. RUSSELL and CHARLES J. RUSSELL, Impleaded Defendants. On appeal of HELEN A. RUSSELL and CHARLES J. RUSSELL, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The subject matter of this litigation comes to us for the third time on appeal. The res consists of two notes totaling $3700.00, secured by real estate mortgages. Inasmuch as the essential facts are fully set forth in two former opinions (Gabl v. Gabl, 305 Ill. App. 620 (Abst.) and Carey v. Funk, 327 Ill. App. 274), they need not be repeated here.

As an indication of the difficulty we experienced in following Russell's brief in the first of these appeals (Gabl v. Gabl, supra), we quote therefrom as follows: "We have, however, notwithstanding that appellant's original and reply briefs are well nigh unintelligible, patiently and carefully read them with as much understanding as they would afford and are of opinion that there is no substantial error in the decree." In the second appeal (Carey v. Funk, supra) we pointed out that "what we stated in our opinion in the former case as to the nature of the appellants'

original and reply briefs applies with equal force to appellants' original and reply briefs filed in the instant appeal." On this third appeal these difficulties were increased by such faulty abstracting that we were obliged to resort to the record to understand the complaint upon which the appeal is predicated.

On this present appeal the pleadings and motions made the record so complicated that it required Russell to devote 28 printed pages at the outset of his brief to ultimately designate the order from which the appeal was taken. The flood of litigation over the ownership of two notes - and that in substance is all that is involved - may be imagined, but not understood, by the fact that although no evidence was offered before the chancellor, Russell felt obliged to file an abstract of 97 pages containing myriads of pleadings, affidavits, petitions, notices, motions and orders, which opposing counsel considered so inadequate and misleading as to necessitate the filing of an additional abstract of 90 pages in an effort to clarify the litigation; and having cast the burden of examining all these pyrotechnics upon the court, there is still grave doubt as to the effect of the court's rulings on the respective motions of plaintiff and defendants for summary judgment which were made before the case was at issue and before anyone could possibly ascertain what the issues were or whether summary judgment would be proper.

In an apparent effort to keep this show on the road, the complaint in this proceeding was filed on the same day on which Judge Miner entered the final order in Carey v.

Funk, which was subsequently appealed from but affirmed, and in which cause we decided the very issue presented on this appeal. Plaintiff here contends that all matters of defense interposed were res adjudicata because of the final decision in Carey v. Funk and by verdict because of the final decision in Gabl v. Gabl. The defense of res adjudicata was interposed by plaintiff in a written motion, verified, praying that defendants' answer be stricken because of the final decisions on the former appeals. With that motion plaintiff filed a written argument. No counteraffidavit was filed, and the allegations set forth in the motion were not denied or contravened. The final order entered by the chancellor denied defendants' motion for summary judgment, as well as plaintiff's counter-motion for summary judgment; that, however, was not a final order because the case was not at issue. It also granted plaintiff's motion to strike the answer of defendants; that was a final order, and as we view it, the only one appealed from. It involved the question whether Frank Gabl made a gift of the notes in question to his wife, or whether he merely handed them to her so that she could sue upon them as his agent and trustee. The chancellor in this proceeding, discerning the issue raised by the complaint, with supplemental amendment and the answer of Charles and Helen Russell, succinctly summarized the question presented as follows: "But one principal underlying issue is presented by the case: either Frank Gabl did give the note to his wife, as a gift, or under a contract (in which case *** it would be 'too bad' for the plaintiff), or, he merely handed her the note so she could sue on it as his

agent and trustee (in which case *** it would be 'too bad' for the defendant)." Both of those issues were presented on the former appeals with exhaustive citation of authorities and summarization of the rule applicable to the defenses of res adjudicata, and as counsel for plaintiff pertinently states in his brief: "Nothing we could add to that summarization could improve it."

Accordingly the order of the Circuit Court should be affirmed, and it is so ordered.

Order affirmed.

Sullivan, P. J., and Scanlan, J., concur.

44446

THEODORE A. KOLB, Appellee, v. DOROTHY GABL and ALBERT J. HORAN, Individually and as Bailiff of the Municipal Court of Chicago, Defendants, and HELEN A. RUSSELL and CHARLES J. RUSSELL, Impleaded Defendants. On appeal of HELEN A. RUSSELL and CHARLES J. RUSSELL, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The subject matter of this litigation comes to us for the third time on appeal. The res involved in the first two appeals consisted of two notes totaling $3700.00, secured by real estate mortgages. The res in the present appeal is a $500.00 note, on which a judgment was entered, following which, on an execution sale, an apartment building was sold to the assignee of the judgment creditor for $1085.00, and another apartment building for $9.19. Inasmuch as the essential facts are fully set forth in two former opinions (Gabl v. Gabl, 305 Ill. App. 620 (Abst.) and Carey v. Funk, 327 Ill. App. 274), they need not be repeated here.

As an indication of the difficulty we experienced in following Russell's brief in the first of these appeals (Gabl v. Gabl, supra), we quote therefrom as follows: "We have, however, notwithstanding that appellant's original

and reply briefs are well nigh unintelligible, patiently and carefully read them with as much understanding as they would afford and are of opinion that there is no substantial error in the decree." In the second appeal (Carey v. Funk, supra) we pointed out that "what we stated in our opinion in the former case as to the nature of the appellants' original and reply briefs applies with equal force to appellants' original and reply briefs filed in the instant appeal," On this third appeal these difficulties were increased by such faulty abstracting that we were obliged to resort to the record to understand the complaint upon which the appeal is predicated.

On this present appeal the pleadings and motions made the record so complicated that it required Russell to devote 28 printed pages at the outset of his brief to ultimately designate the order from which the appeal was taken. The flood of litigation over the ownership of three notes - and that in substance is all that is involved - may be imagined, but not understood, by the fact that although no evidence was offered before the chancellor, Russell felt obliged to file an abstract of 97 pages containing myriads of pleadings, affidavits, petitions, notices, motions and orders, which opposing counsel considered so inadequate and misleading as to necessitate the filing of an additional abstract of 90 pages in an effort to clarify the litigation; and having cast the burden of examining all these pyrotechnics upon

the court, there is still grave doubt as to the effect of the court's rulings on the respective motions of plaintiff and defendants for summary judgment which were made before the case was at issue and before anyone could possibly ascertain what the issues were or whether summary judgment would be proper.

In an apparent effort to keep this show on the road, the complaint in this proceeding was filed on the same day on which Judge Miner entered the final order in Carey v. Funk, which was subsequently appealed from but affirmed.

In the instant case the plaintiff, as successor in interest to Frank Gabl, sued Dorothy Gabl, the successor in interest to Hattie Gabl, and, later, her transferee, Helen A. Russell, and the Bailiff of the Municipal Court of Chicago, and asked that the Bailiff be enjoined from issuing deeds on the execution sales of the two apartment buildings (the deeds being ready for issuance within three days after the suit was filed) on the ground that Frank Gabl, and not Hattie Gabl, his wife, was the owner of that note, and the judgment entered on it. The defendants in their answer set forth the details of their acquisition of the note in question, all of the said facts being precisely the same as those attending the alleged transfer of the two mortgage notes, which were the subject matter of the litigation in the two former appeals.

Plaintiff here contends that all matters of defense interposed were res adjudicata because of the final decision in Carey v. Funk and by verdict because of the final decision

in Gabl v. Gabl. The defense of res adjudicata was interposed by plaintiff in a written motion, verified, praying that defendants' answer be stricken because of the final decisions on the former appeals. With that motion plaintiff filed a written argument. No counteraffidavit was filed, and the allegations set forth in the motion were not denied or contravened.

The facts surrounding the acquisition of the note in question by Hattie Gabl, as set forth in the answer, were exactly the same as those previously set forth by the same party, or her privies, in the former cases, in connection with the two mortgage notes, with this exception: the two mortgage notes were payable to bearer, and when they were delivered to Frank Gabl, by the executors of his mother's estate, they were not endorsed, not requiring endorsement. However, the $500.00 note in question in this case, together with another note, was payable to Frank Gabl's mother, and therefore required endorsement by her executors. The chancellor held that this was a distinction without a difference, and with that holding we agree.

The final order entered by the chancellor denied defendants' motion for summary judgment, as well as plaintiff's counter-motion for summary judgment; that, however, was not a final order because the case was not at issue. It also granted plaintiff's motion to strike the answer of defendants; that was a final order, and as we view it, the only one appealed from. It involved the

question whether Frank Gabl made a gift of the notes in question to his wife, or whether he merely handed them to her so that she could sue upon them as his agent and trustee. The chancellor in this proceeding, discerning the issue raised by the complaint, with supplemental amendment and the answer of Charles and Helen Russell, succinctly summarized the question presented as follows: "But one principal underlying issue is presented by the case: either Frank Gabl did give the note to his wife, as a gift, or under a contract (in which case *** it would be 'too bad' for the plaintiff), or, he merely handed her the note so she could sue on it as his agent and trustee (in which case *** it would be 'too bad' for the defendant)." Both of those issues were presented on the former appeals with exhaustive citation of authorities and summarization of the rule applicable to the defenses of res adjudicata, and as counsel for plaintiff pertinently states in his brief: "Nothing we could add to that summarization could improve it."

Accordingly the order of the Circuit Court should be affirmed, and it is so ordered.

Order affirmed.

Sullivan, P. J., and Scanlan, J., concur.

44461

3 37 I.A. 650

EDWARD A. MILLER, Appellee,	)	
	)	APPEAL FROM SUPERIOR
v.	)	
	)	COURT, COOK COUNTY.
FREDERICK'S BREWING COMPANY, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought ejectment against defendant to recover possession of premises located in Thornton, Illinois. After issue was joined by the filing of the complaint and answer, motions for summary judgment were made by both plaintiff and defendant, supported by their respective affidavit and counter-affidavit. Pursuant to hearing the court entered an order allowing plaintiff's motion for summary judgment and denying defendant's like motion, from which defendant appeals.

Plaintiff claims possession by virtue of a quit-claim deed from Marie Overheu, a spinster, and Myrtle Overheu, a widow, dated June 30, 1947, a copy of which was attached to his motion for summary judgment. He alleges that on July 1, 1947 the quitclaim deed was registered under the Torrens Act (Ill. Rev. Stat. 1947, ch. 30, sec. 45 et seq.) with the Registrar of Titles of Cook County, who issued a certificate showing title to the real estate in plaintiff, and that by reason thereof he is entitled to possession of the land in question. A copy of the certificate of title was attached to plaintiff's motion.

Defendant filed a counteraffidavit and affidavit in support of its motion for summary judgment in which it is alleged that James Frederick, the affiant, is president of

the defendant Frederick's Brewing Company, and prior to its incorporation on January 30, 1946, was one of the co-partners thereof; that May 1, 1942 the predecessor in interest of defendant (a co-partnership of which Frederick was a member) leased the premises from one Leo Gottschalk, who was then in possession thereof, "and from said date until July 1, 1945 the defendant's predecessor in interest remained in possession as the tenant of the said Leo Gottschalk"; that on May 1, 1942 and for some time prior thereto Gottschalk was the owner and holder of a certain principal note dated November 24, 1925 in the sum of $4000.00, payable three years after date, executed by Pauline and Frederick Overheu and secured by trust deed conveying title to the property in question as security, to one Henry Gottschalk as trustee, "which said Trust Deed is more fully set out and appears on the Torrens Certificate of Title attached to Plaintiff's affidavit for Summary Judgment as Exhibit 'B'"; that on July 1, 1945 Leo Gottschalk, for valuable consideration paid to him, sold and assigned to defendant's predecessor in interest the said principal note, "and on and from the last mentioned date the defendant's predecessor in interest and the defendant have been in possession of the premises in question in the place and stead of said Leo Gottschalk"; and that "said Leo Gottschalk was in possession of the premises in question on and after default in the terms of the said principal note."

Thereafter plaintiff moved to strike defendant's counter-affidavit and deny its motion for summary judgment, assigning eight reasons, most of which are of a technical nature. One of the grounds urged is that defendant's affi-

davit in opposition to plaintiff's motion for summary judgment and in support of defendant's motion for summary judgment fails to comply with the Civil Practice Act (Ill. Rev. Stat. 1947, ch. 110, sec. 259.15) and rules of court. More specifically it is urged that defendant filed no separate motion to which the affidavit relates, evidently meaning that no separate sheet labeled "motion" was filed. However, the title of defendant's affidavit clearly established and identified itself as a motion for summary judgment, as well as a counteraffidavit in opposition to plaintiff's motion for summary judgment, and therefore we think there is no merit in the point. Nor do we find any merit in the contention that defendant's affidavit is not made on the affiant's personal knowledge. James Frederick, who made the affidavit, identifies himself as president of the corporation and a partner of its predecessor, and sets forth the facts, not on information and belief, but presumably from his personal knowledge. As another ground plaintiff asserts that the affidavit consists of conclusions. A cursory reading of the affidavit and the facts as herein related, indicates that there is no warrant for such a contention. A still further ground is that the affidavit tends to set up a defense of confession and avoidance, whereas the answer of the defendant is a general denial of the complaint. Defendant's answer avers that defendant "is rightfully in possession thereof [the property in question] and has been rightfully in possession thereof for a long time prior to the filing of the complaint herein." Its affidavit clearly alleges evidentiary facts which establish rightful possession,

and is in all respects consistent with its answer. The last ground states that the facts set forth in defendant's affidavit do not show a right of possession superior to plaintiff's title. This of course is precisely the issue involved, and the only substantial question here presented for decision. Plaintiff's brief is completely silent on this issue. However, defendant states the law as we understand it, and as we think the court should have interpreted it.

From the facts stated in defendant's counteraffidavit and affidavit in support of its motion for summary judgment, it appears without dispute that Leo Gottschalk, the owner of the mortgage indebtedness, was in possession of the premises subject to the mortgage on and after default in the terms of the principal note; that on May 1, 1942 defendant's predecessor in interest leased the premises from Leo Gottschalk; that defendant's predecessor in interest was in c ntinuous and uninterrupted possession thereof as Gottschalk's tenant until July 1, 1945, on which date Gottschalk assigned the said mortgage note to defendant's predecessor in interest; also that defendant and its predecessor had been in continuous possession up to October 2, 1947, the date on which this suit was instituted. Nothing in plaintiff's affidavit for summary judgment contravenes any of these established facts. His claim that he was entitled to the superior right of possession under a quitclaim deed is disputed by the very copy of certificate of title issued by the Registrar of Titles of Cook County, which is attached to his affidavit for summary judgment, showing that

it was subject to an existing mortgage. Defendant's affidavit showed that there was a default in the mortgage, and that Gottschalk, as well as defendant and its predecessor, had been continuously in possession after default and before the Statute of Limitations (Ill. Rev. Stat. 1947, ch. 83, sec. 12) could have run.

The law is well settled in this state that the Statute of Limitations does not run against a mortgage debt where the mortgagee, after condition broken, and before the debt becomes barred by the Statute of Limitations, takes possession of the mortgage property. The early case of Fountain v. Bookstaver, 141 Ill. 461, which is precisely in point on the facts, and subsequent cases following it (Illinois Bankers Life Assur. Co. v. Dunas, 333 Ill. App. 192, Taylor v. Baker, 295 Ill. App. 1) squarely decide the issue presented. In the Fountain case plaintiff, who claimed the right to possession by virtue of a quitclaim deed, as plaintiff in this proceeding does, brought ejectment against the assignee of the mortgage indebtedness who was in possession under the same circumstances as defendant herein. In denying plaintiff's claim to possession the court said: "It is difficult to see upon what principle the possession of an equitable assignee of a mortgage, when peaceably acquired, is less lawful than would be that of the mortgagee himself, or his tenant; and so it was held in Kilgour v. Gockley, 83 Ill. 109, that an 'assignee of a mortgage, after condition broken, being in possession of the real estate mortgage, and also being the holder of the note secured by the mortgage, and the assignee thereof can defend his possession under

the mortgage, in ejectment brought by the mortgagor or those claiming under him.'"

The law is also well settled in this state that possession by the owner of a defaulted mortgage is one of the recognized modes under the law for the collection of the mortgage debt (Illinois Bankers Life Assur. Co. v. Dunas, supra, Taylor v. Baker, supra, and Reeve's Law of Mortgages and Foreclosures in Illinois, vol. 2, sec. 642, p. 723). The foregoing authorities cited and discussed in defendant's brief, presenting what we conceive to be the only issue in the case, are totally disregarded by plaintiff. They support defendant's contention that it had a perfect right to remain in possession of the premises until the mortgage debt became fully satisfied. Defendant's affidavit for summary judgment set forth default and continuous possession thereafter, which gave it a right to possession superior to plaintiff's title. Defendant showed by its affidavit that it was entitled to have the issue of the right to possession decided in its favor.

Accordingly, the judgment of the Superior Court is reversed, and the cause is remanded with directions that plaintiff's motion for summary judgment be denied and that judgment be entered in favor of defendant on its affidavit, and costs taxed against plaintiff.

Judgment reversed, and cause remanded with directions, costs to be taxed against plaintiff.

Sullivan, P. J., and Scanlan, J., concur.

44405

HENRIETTA SEATON, Appellee,	)	
	)	APPEAL FROM SUPERIOR
v.	)	
	)	COURT OF COOK COUNTY.
HAROLD T. SEATON, Appellant.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Harold T. Seaton, hereinafter called respondent, and Henrietta Seaton, hereinafter called petitioner, were married in Evanston, Illinois, on September 1, 1939. There was one child born of the marriage, David Gaylord Seaton, now about four and one-half years of age. On July 30, 1947, a decree was entered granting respondent a divorce on his cross-complaint charging desertion. The decree was entered upon a stipulation of the parties that the complaint for divorce filed by petitioner should be dismissed and that respondent be awarded a decree of divorce upon his cross-complaint, the stipulation reciting that petitioner had wilfully deserted and absented herself from respondent without any reasonable cause for the space of over one year immediately prior to the filing of the cross-complaint. The decree ordered that petitioner "shall have the sole care, custody, control and education of the said minor child, David Gaylord Seaton, and the said cross-plaintiff [respondent] * * * shall have the right to visit said child at all reasonable times and places, subject to the further order of this court." The decree further provided that the furniture and furnishings of the apartment in which the parties had lived be transferred to petitioner and become her absolute property, and that respondent assign the lease of the apartment to petitioner. Respondent was ordered to pay eighty-five

dollars per month for the support of the child. On November 13, 1947, petitioner filed the following verified petition:

"1. * * *

"2. That on or about August 22, 1947 [twenty-three days after the entry of the decree], your petitioner herein married Alan Millard Wells, who is an instructor in music at the St. Louis Institute of Music, and it is contemplated by the petitioner that she will maintain a residence in St. Louis, Missouri in order to live with her said husband; that it is contemplated that by July, 1948, her said husband will obtain a position teaching in the Chicago area, in which case your petitioner and her husband will maintain their residence in or about Chicago, Illinois.

"3. The minor child of the parties hereto is now approximately three years of age and needs the maternal care, love and affection of your petitioner, and your petitioner is desirous of removing said child from the jurisdiction of this court to the City of St. Louis, Missouri, temporarily, that is until other arrangements can be made at the termination of this school year in July, 1948.

"4. Your petitioner is desirous of allowing the defendant, Harold T. Seaton, to visit said child at reasonable times and places and in the event this court sees fit to allow her to remove said child to her contemplated residence in St. Louis, Missouri, she is willing to bring said child to Chicago or to the Chicago area, at her own expense, on alternate weekends, that is to say, Saturdays and Sundays,

in order to allow defendant, Harold T. Seaton, to visit said child during those times or at such times as the court may see fit to allow; that your petitioner, if allowed to remove said child to St. Louis, Missouri, pursuant to the prayer of this petition and under the conditions which might be made by order of this court, will continue to maintain her home in Evanston, Illinois, at 622 Hinman Avenue, Evanston, Illinois, where she now resides, and that she will bring said child back to said home in Evanston for the purpose of allowing respondent his visitation rights at such times as the court might see fit to designate.

"5. * * * your petitioner has now acquired a suitable residence with her husband in the City of St. Louis, which is located in a good neighborhood outside the congested area of the city at 768 Clara Avenue, St. Louis, Missouri; that said place of residence is approximately four blocks from Forest Park in said city and is an ideal location for the well being of said child.

"6. Your petitioner believes that it is for the best interests of said child to be permitted to live with your petitioner in St. Louis, while she is there and that she be allowed to bring him to Chicago or the Chicago area, as indicated above, in order that respondent will have an opportunity to visit said child at reasonable times.

"Wherefore, your petitioner prays that the Decree of Divorce heretofore entered herein on July 30, 1947, be modified to provide that your petitioner be permitted to have the child live with her in St. Louis, Missouri until the further order of the court, with specific instructions

as to the times and places respondent shall be allowed to visit said child and that petitioner have such other and further relief as equity may require."

Respondent filed a verified answer to the petition, in which he averred, inter alia, that Alan Millard Wells had never been a resident of Chicago but has been a resident of Kansas City, Missouri, and is now employed in St. Louis, Missouri; "that the said child also needs the paternal care, love and affection of the respondent to said petition and that is the reason the said child should not be permitted to be removed from the jurisdiction of this court so that the father would be deprived of his society and would not be allowed access to him on all reasonable occasions and would offer the opportunity to alienate the affections of the child from your respondent.

"4. Your respondent does not believe that it would be to the best interests of the said child to take him to St. Louis, Missouri and bring him in to Chicago for the respondent to see on alternate weekends; that a trip of that kind, approximately 285 miles by railway and entailing five hours or more travelling time in each direction, would not be to the best interests of the child; that the child being a ward of this court should remain within its jurisdiction, and the said child should not be removed therefrom because of the remarriage of the child's mother who desires to live in a foreign jurisdiction.

"5. * * *

"6. Denies that it would be to the best interests

of the said child to live with the petitioner in St. Louis, Missouri; that if the said petitioner desires to go and live in St. Louis, this respondent is well able to maintain a home in the jurisdiction of this court so that the child could live with him and be cared for by him in the environment where the child has been reared and in the place where your respondent is employed.

"Wherefore, respondent prays that the prayer of the petition filed herein as aforesaid be denied and that the said petitioner be refused permission to take said child from the jurisdiction of this court."

At the commencement of the hearing before the chancellor upon the petition and answer, the following colloquy took place between the court and counsel: "Mr. Canel [attorney for respondent]: Now, if the Court please, I think all the cases in Illinois are uniform, starting with 11 Illinois, the Miner case - The Court: You don't have to cite the law. Mr. Canel: The child here is of tender years. The Court: How old is the child? Mr. Canel: Three years and three months. The father is very much concerned here. The Court: There is a practical proposition here. This woman is remarried, and she has her husband in St. Louis. I know the law, and this Court has no power to permit the removal of the child to another jurisdiction of this court. That is well settled law. It starts back with the 11th Supreme Report. That law was based on the rights of a father, to see his child at reasonable times; and taking it away from the jurisdiction of the court, he couldn't do so. Every case since then has been based on

that same premise. These people are divorced, their home is broken, and she now has a good home. We are concerned with the welfare of this child. Is the child to be booted about here? Either one of these people should make a little sacrifice for the child. What kind of love is that of a parent for the child - or is it more love for themselves? St. Louis is just over the river of the jurisdiction of this court. If the home were in East St. Louis, there would be no question about it. But, this is just across the river. She has a good home for the baby and she is its mother. Why couldn't you work out a reasonable proposition where she can bring the child up here, and they both will have access to this child; that the child can then grow up like a normal person with the fond memory of both of the parents. Why not approach it from that angle?"

The chancellor then proceeded to hear testimony. Petitioner testified that she was maintaining an apartment in Evanston, Illinois, and that her remarriage has caused her to live in both places, Evanston and St. Louis; that "I now wish to have the child come to live with me and my husband in St. Louis. I now wish to take the child there for three weeks and allow my former husband to see him on the fourth week. I have an apartment in St. Louis and it is near Forest Park. It has two and a half rooms and bath; I can take him there. It is not as large as the apartment in Evanston. The child will get the same space and care in St. Louis. If the court sees fit to let me take the child to St. Louis and return here for the fourth

week I am willing to let my husband see the child in the fourth week, regardless of the days or number of days. The only thing that I want is that he be brought back to me at night"; that the child was three years old on September 2, 1947; that "I feel it is for the welfare of the child that he live with me in St. Louis, because when I am away from him, going back and forth, it makes him insecure. I have not taken him to St. Louis since the entry of the decree. My mother has cared for the child while I was in St. Louis. She lives in Griggsville, Illinois. She comes here and takes care of the child while I am away." Upon cross-examination petitioner testified that the home in Evanston "is a nice place to live" and that her mother takes good care of her son when she is in St. Louis; that she would bring the boy in once every four weeks, or one week out of every four, to Chicago by rail. Respondent testified that he objected to his former wife taking the child to St. Louis to live, that he wants him here in the City of Chicago; that the child was reared here; that respondent is employed by The Montgomery Ward Company and pays eighty-five dollars per month for the support of the child; that "I am objecting to her taking the child to St. Louis. I think the child should remain here as I am very fond of him and he is fond of me. It is easy for children to forget quickly. If he is away from me for three weeks, it seems reasonable to me I will become just another fellow. Secondly, I object to him being taken out of the jurisdiction of the court in the case. Something might come up that could require the

attention of the court. Thirdly, I believe that the round trip to St. Louis and back will be arduous for my son and that he will over the course of time make up with his foster father and will not want to see me." Upon cross-examination he testified that "my former wife is not caring for the child now. Her mother is. My former wife has not been in town for three weeks." Petitioner was recalled to the stand. She testified that her present husband "is a music instructor at the St. Louis Institute of Music"; that "he is going to try to work in Chicago"; that "he is expected to teach summer school"; that she expected him to get a position in Chicago; that she will live in Chicago after July or August of 1948. Upon recross-examination she testified that her present husband was not a resident of Chicago and that his family resides in Kansas City, Missouri; that he is in St. Louis now. Thereupon the chancellor entered the following decretal order:

"This matter coming on to be heard on the petition of Henrietta Seaton and the answer thereto filed on behalf of Harold T. Seaton and the parties being before the court and the court having heard the arguments of the counsel and being advised of the premises the court doth find:

"1. It has jurisdiction of the persons and subject matter herein.

"2. That a decree of divorce was entered herein on the 30th day of July, 1947, which awarded the custody of the minor child to Henrietta Seaton.

"3. That the said Henrietta Seaton was married on

or about the 22nd day of August, 1947 to Allan Millard Wells who is now instructor at the St. Louis Institute of Music in St. Louis, Missouri.

"4. That it is contemplated that by July, 1948 the said husband of Henrietta Seaton (Wells) will obtain a teaching position in the Chicago area and that they will maintain their residence in and about Chicago, Illinois.

"5. That the minor child of the parties hereto is three years and four months of age, and that the said Henrietta Seaton (Wells) in order to provide for the welfare of the child is desirous of removing the said child from the jurisdiction of this court to the City of St. Louis temporarily.

"6. That the said Henrietta Seaton (Wells) is desirous of allowing Harold T. Seaton her former husband to visit with the minor child of the parties hereto at reasonable times and places and has complied with the provisions of the decree heretofore entered herein.

"7. That the minor child of the parties hereto is of such tender years that it ought to have the maternal care, love and affection of its mother and that said minor child ought to be with its mother taking all possible precautions to protect the interests of the father, Harold T. Seaton.

"8. That the said Henrietta Seaton (Wells) is now maintaining a home for herself and the minor child of the parties at 622 Hinman Avenue, Evanston, Illinois, and that if this court allows her to take the child with her to St.

Louis, Missouri, she will bring the said child to Evanston every fourth week for a period of seven days and allow the said Harold T. Seaton to visit with the said child every day and will allow him to take the said child with him during the day or at reasonable hours in the evening on the condition that the said Harold T. Seaton will return the child to its mother at bed time during the entire year.

"9. That if the court allows the said Henrietta Seaton (Wells) to remove the said minor child to St. Louis she will post a One Thousand ($1000.00) Dollar penalty bond to insure the performance of the conditions hereinbefore mentioned.

"10. That it is for the best interests and the proper upbringing of the minor child of the parties hereto he remain with its mother and, that it would not in any way harm the minor child if it were to reside in St. Louis for three weeks and return to visit its father Harold T. Seaton on the fourth week.

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

"a. That Henrietta Seaton (Wells) be and is hereby permitted to remove the minor child of the parties hereto, David Gaylord Seaton, from the jurisdiction of this court to St. Louis, Missouri for a period of three out of every four weeks, and to return the said child to the home of the said Henrietta Seaton (Wells) at 622 Hinman Avenue, Evanston, Illinois on and during every fourth week, and during each said week to allow Harold T. Seaton, the father of the minor child, to visit with him at any time he desires,

except that the said minor child shall be returned to the home of Henrietta Seaton (Wells) at 622 Hinman Avenue, Evanston, Illinois in the evening at about 8:00 p.m., in order that the child would sleep in the home of the said Henrietta Seaton (Wells) until further order of court.

"b. The said Henrietta Seaton (Wells) shall post a bond in the amount of One Thousand ($1000.00) Dollars with Clara B. Vennewitt as surety on the said bond guaranteeing her performance of the return of the said child to the jurisdiction of this court as provided above.

"c. That all other orders heretofore entered herein not inconsistent with this order shall remain in full force and effect."

Respondent appeals from that order.

Respondent contends that "where a divorce decree awards custody of a child to one parent, the other parent is entitled to have the child kept within the jurisdiction of the court." In Miner v. Miner, 11 Ill. 43, the law was established that it is against the policy of our laws to permit the removal of a minor child beyond the jurisdiction of the court. The chancellor in the instant proceeding knew the law and stated that he "has no power to permit the removal of the child to another jurisdiction of this court," but sought to justify the entry of the improper and inequitable decretal order he was about to enter upon the ground that St. Louis was just across the Mississippi river, ignoring the fact that St. Louis, Missouri, is without the jurisdiction of the court just as much as a city

in California would be. The attorneys for petitioner, in her brief, make a feeble attempt to justify the order entered by claiming that the order "merely permits plaintiff temporarily to take the child from the jurisdiction of this court for short intermittent periods, while maintaining a permanent residence in this state." When this appeal was reached in this court upon the oral argument calendar petitioner's counsel failed to appear. In support of her claim petitioner cites Smith v. Smith, 101 Ill. App. 187, which holds that the parties are entitled to have the child kept within the jurisdiction and reach of the process of the court in order that its mandates may be immediately effective; she also cites Hewitt v. Long, 76 Ill. 399, which strongly condemns an order akin to the instant one and states, in forceful language, that the rights of the unoffending parent should be fully protected. Here, petitioner stipulated that she was the guilty party in the divorce proceeding, and the reason that prompted her to desert her home and husband is obvious. She produced the present unfortunate situation as to the child, while the instant decretal order, in effect, rewards her and punishes the innocent respondent. She stated in her petition that she believed it was for the best interests of the child to live with her in St. Louis while she is there, and prayed that she be permitted to have the child live with her in St. Louis, Missouri, until the further order of the court. She testified, "I now wish to have the child come to live with me and my husband in St. Louis"; that she now wished to take the child there

for three weeks and allow her former husband to see the child in the fourth week. There is nothing temporary about a decretal order which permits the removal of the boy from the jurisdiction of the court for seventy-five per cent of each month until the further order of the court. The order entered is not only contrary to the public policy of this State, but is highly inequitable under the facts. It is true that a chancellor has the power to permit a ward, under special circumstances, to be taken temporarily out of the jurisdiction of the court, but the instant case presents no special circumstances that would justify the entry of the decretal order.

The decretal order of the Superior court of Cook county is reversed.

DECRETAL ORDER REVERSED.

Sullivan, P. J., and Friend, J., concur.

44407

PEOPLE OF THE STATE OF ILLINOIS ex rel. ZADA T. TEMPLETON, MERYL HABERMAN, MAUREEN LANG and JEANNETTE EPPLEY, Appellants,	) APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
v.	
THE BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 201, COOK COUNTY, ILLINOIS, Appellee.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a judgment order of the Superior court of Cook county dismissing their complaint for writ of certiorari.

We have this day filed an opinion in the mandamus case of People ex rel. Templeton et al. v. Board of Education et al., Gen. No. 44420. The instant plaintiffs were the relators in that proceeding and the allegations in the complaint in the instant case are essentially the same as the allegations in the complaint in the mandamus case, save that the instant complaint recites the filing of the mandamus complaint and the judgment entered therein. In the instant case defendant answered the complaint and plaintiffs then filed a motion to strike the answer, and this motion was set down for hearing. The hearing was continued a number of times. After the relators in the mandamus case had appealed from the order dismissing their complaint in that case, defendant in the instant case was allowed, over the objection of plaintiffs, to file a petition for leave to withdraw its answer and to file a motion to dismiss the instant complaint, which motion, over the

objection of plaintiffs, was allowed, and the motion was then filed. It alleges: "That there is another action pending between the same parties for the same cause of action as is set forth in the complaint for certiorari filed herein; that as appears from the sworn petition filed herewith, the same plaintiffs in the case at bar have previously instituted mandamus proceedings in the case entitled People ex rel. Templeton et al. v. Board of Education et al., No. 46 S 15543 setting forth substantially and essentially the same cause of action that is set forth in the complaint for certiorari filed herein; that a final order was entered April 23, 1947, by Judge Joseph Graber of the Superior Court of Cook County dismissing said mandamus petition from which final order an appeal has been prosecuted and perfected by the plaintiffs in the mandamus proceeding * * *; that said appeal is still pending and the appellants therein have filed briefs and abstracts in the Supreme Court of Illinois and the briefs of the defendants in said proceeding (consisting of the defendant named in this proceeding and the individual members of the Board of Education of Township District 201 Cook County, Illinois) are to be filed in the Supreme Court of Illinois by October 8, 1947. WHEREFORE, defendant prays for an order dismissing the above entitled cause [the instant suit] as provided by Section 48 (D) of the Civil Practice Act." The trial court, after a hearing of the motion to dismiss, entered the judgment order from which plaintiffs have appealed.

Plaintiffs contend that "the defense of another action pending must be made in apt time, and Section 48d of the Civil Practice Act requires it to be made at the earliest practicable time." Plaintiffs strenuously argue that a defense based on the pendency of another action is in the nature of a plea in abatement pleading dilatory matter and that it must be interposed at the earliest possible time, and that it comes too late after the party has answered upon the merits of the case and several continuances have been granted defendants upon the hearing of plaintiffs' motion to strike the answer. We have concluded, however, that in determining the merits of this appeal we need not pass upon this contention.

While there is force in another contention raised by plaintiffs, that "there is a substantial difference between the remedies of mandamus and certiorari and the denial of one remedy is not a bar to a suit for the other," we do not deem it necessary to pass upon that contention.

The third contention raised by plaintiffs is clearly a meritorious one. They contend that in view of the position of the instant defendant in the mandamus proceeding the entry of the instant judgment was a highly inequitable one and that a just and proper order for the trial court to have entered in the instant case was to stay the proceedings in the instant case until the appeal in the mandamus case has been finally decided in the reviewing courts. In passing upon the instant contention it must be noted that in the mandamus case the relators were denied a hearing upon

the merits upon the ground, advanced by defendants and finally adopted by the court, that if they had a cause of action it could be maintained only by a writ of certiorari. To protect the interests of the relators in the mandamus case their counsel filed the present certiorari proceeding. If the relators in the mandamus proceeding finally lose their appeal and the instant judgment stands, they would then be deprived of an opportunity to prosecute their claim for relief in mandamus or certiorari. Such a result might produce a miscarriage of justice. The records in the two appeals warrant an inference that defendant Board of Education seeks to avoid any hearing upon the merits of plaintiffs' claim. The fair order for the trial court to have entered would be one deferring further proceedings in the instant case until the merits of the relators' appeal in the mandamus proceeding have been finally determined. Such an order is justified under Hailman v. Buckmaster, 8 Ill. (3 Gilm.) 498, 501.

The judgment order of the Superior court of Cook county is reversed, and the cause is remanded with directions to the trial court to enter an order deferring further proceedings in the instant case until the merits of the mandamus proceeding have been finally determined.

JUDGMENT ORDER REVERSED, AND
CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

44420

PEOPLE OF THE STATE OF ILLINOIS ex rel. ZADA T. TEMPLETON, MERYL HABERMAN, MAUREEN LANG and JEANNETTE EPPLEY, Appellants,	APPEAL FROM
v.	SUPERIOR COURT OF
THE BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 201, COOK COUNTY, ILLINOIS; RICHARD W. HOFFMAN, President; GEORGE PETRU, JOSEPH F. MRIZEK, E. W. CHODL and A. M. JANECEK, Members of said Board of Education, Appellees.	COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The following judgment order was entered in the instant case, a mandamus proceeding:

"This cause coming on to be heard on the motion of relators to strike the answer of respondents to the complaint for Writ of Mandamus, and the Court, having now considered the same and heard the arguments of the respective counsel for the parties hereto,

"And it appearing to the court that the question of whether or not the relators have had a hearing under Article 24 of the School Code of Illinois cannot be determined without the production of the records of the respondent Board of Education which the court finds cannot be done by a Writ of Mandamus but requires the intervention of a Writ of Certiorari,

"It Is, Therefore, Ordered that the complaint for Writ of Mandamus be and it is hereby dismissed at relators' costs."

Relators took a direct appeal to the Supreme court, claiming that a constitutional question was involved. The Supreme court transferred the cause to this court upon the ground that it affirmatively appeared from the record that no constitutional question was passed upon by the trial court. In its opinion the court states (399 Ill. 204, 210, 211):

"The order of the trial court in this case expressly recites, in substance, that the complaint is dismissed because, in the opinion of the court the question whether or not the relators have had a hearing under article 24 of the School Code cannot be determined in an action of mandamus, but requires the intervention of a writ of certiorari. It is apparent upon the face of the order that the court dismissed the complaint solely because, in the opinion of the court, the relators had mistaken their remedy and that the only question determined by the court was the propriety of the form of action."

The complaint alleges that each of relators was a full-time teacher at the J. Sterling Morton High School and had entered upon contractual continued service under the provisions of Article 24 of the School Code of Illinois, each of them having served as a probationary teacher for a period of two years; that they each held contracts to teach for all the years of their employment and held contracts with the defendant Board for the last year of their respective probationary period and for the school year which closed on June 7, 1946, and that they continued to teach

until the close of the school year on that date. The form of the contracts, which were all alike, is set forth in the complaint. The complaint also sets forth that each of the relators was married during their employment as teachers and charges that on March 29, 1946, the superintendent of schools of the district sent each of them a letter stating that after considering the matter very carefully, the Board had voted unanimously to keep to its original policy that women who became married may serve two years after their marriage and then retire; that the letter further stated: "During the war years this rule was held in abeyance, but it is hereby reinstated; and so in accordance with the board's instructions you will not be offered a contract to teach at Morton for the next school years." The complaint further avers that the relators, on April 6, 1946, each served upon the Board of Education a written request for a hearing by the Board on the notice of dismissal dated March 29, 1946, but that no hearing was ever given to them, and that on June 10, 1946, they each served upon the Board and upon the president and each member thereof a written demand that the "purported notice of dismissal" be withdrawn by official action of the Board and relators given official notice of such withdrawal, and that they be permitted to continue as teachers at the opening of the next following school year in September, 1946, which demand defendants refused and still refuse to comply with; that there is no provision in the contracts of relators providing for the

termination thereof in the event of marriage; that the rules of defendant Board have not been published, and that defendant Board has never given notice to any of relators of any validly adopted rule providing for the removal or dismissal of women teachers in the event of their marriage; that no provision of the School Code of Illinois and no statute of the State of Illinois authorizes defendant Board to dismiss or remove women teachers in the event of their marriage, and that the attempted termination of the contractual continued service of relators violates the rights of relators under Section 2 of Article II of the Illinois constitution and the first section of the fourteenth amendment to the constitution of the United States.

Defendants filed a motion to strike the complaint and assigned therein two grounds in support of it, but we need only refer to the first, viz., "that the court does not have jurisdiction to hear said matter as a Writ of Mandamus and if the plaintiffs have any cause of action it could be maintained only by a Writ of Certiorari." When the trial court overruled that motion defendants did not stand by it but elected to file an answer to the merits of the complaint. Relators contend that any question as to whether mandamus was the proper remedy for relators was waived by defendants' answer to the merits of the complaint, and they cite in support of the contention People v. Lueders, 287 Ill. 107, where the court states (pp. 109, 110):

"A proceeding for a writ of mandamus is an action at law, and the petition, answer and subsequent pleadings are

governed by the same rules as apply to an ordinary action at law. (Silver v. People, 45 Ill. 224; Dement v. Rokker, 126 id. 174; Board of Supervisors v. People, 159 id. 242; People v. Board of Education, 236 id. 154.) The petition takes the place of the alternative writ at common law and is in the nature of a declaration. (City of Chicago v. People, 210 Ill. 84; People v. Pavey, 151 id. 101; People v. Busse, 247 id. 333.) An answer to the merits of a petition for a writ of mandamus waives a demurrer, and an issue at law as to the right of the petitioner for the relief prayed for on the facts stated in the petition cannot be raised by setting up in an answer facts designed to raise such an issue. (Chicago Great Western Railway Co. v. People, 179 Ill. 441.) A respondent may demur or answer, and if he answers the answer must traverse by distinct and direct denial the facts alleged in the petition upon which the claim of the relator is founded, or by confession and avoidance set up other facts sufficient in law to defeat the claim. All the material facts alleged in the petition and not denied by the answer are admitted to be true. (Chicago and Alton Railroad Co. v. Suffern, 129 Ill. 274; People v. Crabb, 156 id. 155; People v. Commissioners of Cook County, 180 id. 160.)"

While the contention of relators is not without some force, in our view of this appeal we deem it unnecessary to pass upon it. We note, however, that the dismissal of the complaint was not upon the motion of defendants. The answer filed by defendants admits that relators were regularly employed full-time teachers prior to June 7, 1946, but denies

that they were so employed after that date; it admits that relators held written contracts to teach for all the year of their employment and that they each held a written contract to teach for the school year which closed on June 6, 1946. The answer contains a series of excerpts from the records of defendant Board, showing that on April 21, 1936, the Board had adopted a policy that "new women applicants who are married are not to be employed, but that a normal leniency be shown to those now employed not to exceed two years after the current year"; that on December 16, 1938, this policy was discussed and reaffirmed by the Board; that on March 29, 1943, the Board voted by unanimous agreement to hold in abeyance during the war the rule limiting the tenure of married women teachers to two years; that on June 26, 1945, the Board discussed and affirmed its policy in regard to married women teachers and decided to serve notice that at the close of the war the policy of retaining married women only two years after marriage would be enforced, and that on March 28, 1946, at a special session called to hear the married women teachers, who had requested the privilege of meeting with the Board, relators were present and each gave reasons why she should be allowed to continue on the faculty of the school, and after the teachers had left the meeting, the Board reiterated its policy in regard to married teachers and requested the superintendent to send letters of notification to relators. The answer admits the written request of relators for a hearing and their written demand to be reinstated as teachers. It denies that the relators

were removed or dismissed, but states that because of their marriage, they were, in accordance with the rules of the Board, simply not hired, and that the notice to them of March 28, 1946, was not a notice of removal or dismissal, but was a notice that relators did not qualify under the rules and regulations of defendant Board. In their answer defendants deny violating any constitutional, statutory or contractual rights of relators and further deny violating any rights of relators as teachers having contractual continued service under the School Code of Illinois. By filing a motion to strike relators admitted the averments of the answer that were well pleaded.

Relators' motion to strike defendants' answer sets up that the answer pleads no facts constituting a defense; that it alleges facts constituting an admission of the facts alleged in the complaint and shows on its face that the allegations of the complaint are true and that relators are entitled to judgment and a writ of mandamus as prayed in the complaint; that the answer admits that defendants, in dismissing relators, did not comply with the provisions of Article 24 of the School Code; that the answer fails to show the existence of a rule authorizing discharge of relators without compliance with the School Code, and shows affirmatively that relators never received the statutory hearing to which they were entitled. The motion charges that the purported rule of defendant Board in regard to married women teachers is beyond the power of the Board to adopt and is a violation of the constitutional, statutory

and contractual rights of relators and a violation of the public policy of Illinois.

There is no law that required either of the parties to the instant proceeding to produce the records of defendant Board of Education. It is the established practice in mandamus proceedings to set up, in substance, in the pleadings, the material parts of the record, and the parties followed that practice in the instant case. As part of defendants' answer they allege, in substance, the records and proceedings of defendant Board which they considered material in determining relators' claim for relief and upon which they relied, and it purports to set forth all of the steps taken by defendants in the matter of the alleged "dismissal" of relators. Relators' motion to strike does not question defendants' statements in their answer as to the steps taken by them in the matter of the "dismissal" of relators, but it alleges that the answer does not set up a defense to relators' complaint. In passing upon relators' motion to strike the answer the trial court had no right to assume that defendants' answer did not set up, in substance, the records and proceedings of defendant Board which they considered material concerning relators' claim for relief and upon which they relied. Relators' motion to strike the answer raised squarely a question of law, but the trial court, instead of passing upon relators' motion to strike, entered, sua sponte, the judgment order dismissing relators' complaint, and saw fit to incorporate in the order his reasons for entering the order dismissing relators' writ of mandamus. As we

understand the trial court's reasons for entering that order, the court concluded that he could not determine the merits of the case upon the pleadings before him; that he then assumed, without warrant, that the merits could be determined if the records of defendant Board of Education were produced - ignoring the fact that the records were not required in a mandamus proceeding; that he then held that the production of the records required the intervention of a writ of certiorari, and therefore relators' writ of mandamus should be dismissed. We are forced to the conclusion that the instant judgment order was based upon unwarranted assumptions of fact and ill-founded conclusions of law. There is force in relators' complaint that the trial court, because he could not determine the merits of defendants' defense from the answer, penalized relators and dismissed, without warrant, their writ of mandamus; and in this connection relators call attention to the fact that the trial court had overruled defendants' motion to strike the complaint and that defendants had elected to answer the complaint. Defendants, in their brief, make little, if any, effort to defend the reasoning of the court in entering the dismissal order. They cite in support of their statement that "mandamus will not lie in the case at bar," People ex rel. Elmore v. Allman, 382 Ill. 156. The question before us was not present in that case. It is significant, however, that in that case the established rule was followed and the answers of the defendants set up the proceedings before the Commission as it related to the respective plaintiffs. In numerous mandamus cases before

the Supreme court the established rule was followed. It is clear that the trial court erred in holding that the merits of relators' complaint could not be determined without the production of the records. Defendants' motion to strike raises constitutional questions and we express no opinion as to the merits of the motion to strike.

The judgment order of the Superior court of Cook county is reversed, and the cause is remanded with directions to the trial court to pass upon relators' motion to strike the answer of defendants, and for further proceedings not inconsistent with this opinion.

JUDGMENT ORDER REVERSED, AND
CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

Gen. No. 10344

IN THE
APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D. 1949

Otto DeMitchell and
Virginia G. Halstead,
(Plaintiffs) Appellees,

vs.

Walter C. Haas,
(Defendant) Appellant

Appeal from Circuit
Court, Will County

Honorable
James V. Bartley,
Judge Presiding

GEORGE W. BRISTOW, J:

This is an appeal from the two judgments, one for seventy-five hundred dollars, entered in favor of the plaintiff, Otto DeMitchell, for personal injuries, and the second in the amount of six hundred and eighty-five dollars for the plaintiff, Virginia G. Halstead, for property damage, both against Walter C. Haas in the Circuit Court of Will County. This case was tried before the Court without a jury. The damages claimed are the result of an automobile accident which occurred on July 27, 1947 at three-thirty a.m. at the intersection of U.S. highway 66-A and Theodore Street in Joliet Township, Will County. Highway 66A runs generally north and south and intersects Theodore Street at right angles.

At the time of the occurrence in question, DeMitchell and Halstead were operating a bingo game at a carnival a few miles west of the intersection in question. DeMitchell had been to Joliet in the automobile, the property of Mrs. Halstead, and was returning with a tub of water in the back seat of his car. DeMitchell was driving north, and when he turned west on

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At the time of the occurrence in question, DeMitchell and Halstead were operating a bingo game at a carnival a few miles west of the intersection in question. DeMitchell had been to Joliet in the automobile, the property of Mrs. Halstead, and was returning with a tub of water in the back seat of his car. DeMitchell was driving north, and when he turned west on

Gen. No. 10544

IN THE
APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D. 1940

Otto DeMitchell and Virginia G. Halstead, (Plaintiffs) Appellees,	Appeal from Circuit Court, Will County
v.	
Walter C. Hess, (Defendant) Appellant	Honorable James T. Hartigan, Judge presiding.

GEORGE W. BRISTOW, J:

This is an appeal from the two judgments, one for seventy-five hundred dollars, entered in favor of the plaintiff, Otto DeMitchell, for personal injuries, and the second in the amount of six hundred and eighty-five dollars for the plaintiff, Virginia G. Halstead, for property damage, both against Walter C. Hess in the Circuit Court of Will County. This case was tried before the Court without a jury. The damage claims are the result of an automobile accident which occurred on July 27, 1937, at approximately 8:00 in the intersection of U.S. Highway 66-A and Theodore Street in Joliet Township, Will County. Highway 66-A runs generally east and south and intersects Theodore Street at right angles.

At the time of the occurrence in question, DeMitchell and Halstead were operating a pickup truck at a distance of a few miles west of the intersection in question. DeMitchell had been to Joliet in the automobile, the property of Mrs. Halstead, and was returning with a tub of water in the back seat of his car. DeMitchell was driving north, and when he turned west on

Theodore Street he was struck by the Defendant's car which was proceeding south on Route 66A. Inasmuch as this appeal is predicated principally upon the question of the weight of the evidence, it will be appropriate to examine the factual phase of this case closely.

DeMitchell testified he was traveling about fifteen miles per hour as he was about to turn west on Theodore Street; that he looked up Theodore Street and saw a taxicab approaching from the west; that when he looked north the only lights visible on Highway 66A were four blocks away; and that just as he turned west on Theodore Street something came out of the dark and knocked him sideways. Robert Dodge was the driver of the taxicab coming east. He testified that he had stopped at the stop sign before entering upon Highway 66A; that he saw the entire accident; and, after being closely interrogated by the trial court, stated positively the lights were not burning on the Defendant's car at the time of the accident, but that they were burning upon the Plaintiff's car.

The defendant and his wife occupied the car that struck the plaintiff. They had been in attendance at a party given in honor of Mr. Floyd, who was President of the Teamsters Union of Joliet, Illinois. This dinner was held at the Hi-Ho Club, and was attended by twenty-five guests. Those first arriving at the festivities appeared about eight P.M. Mr. and Mrs. Haas did not arrive until nine P.M. The group ate dinner, danced and drank a few beers until the place closed at two A.M. After this the defendant and his wife proceeding in one car, and Mr. and Mrs. Mammosser and Mr. and Mrs. Floyd driving in another car went to the Grand View Lunch Stand on Route 66A. At this stop this group

Theodore Street [illegible] was proceeding south on Route 66A. Inasmuch as [illegible] is predicated primarily upon the question of the weight of the evidence, it will be not material to describe the factual place of this case [illegible].

Defendant testified he was traveling at a rate of fifteen miles per hour as he was about to turn west on Hudson Street; that he looked to Theodore Street [illegible] and saw no vehicle approaching from the west; that when he [illegible] the vehicle of the plaintiff on Highway 66A were [illegible] of a [illegible] he turned west on Theodore Street [illegible] the last and fatal moment his attention [illegible] Robert Doyle was the driver of the truck coming east. He testified that he had stopped at the stop sign before entering the highway; that he saw [illegible] approaching; and, after being [illegible] the total amount, stated positively that lights were not burning on the Defendant's car at the time of the accident, but that they were burning upon the Plaintiff's car.

The defendant and his life companion are [illegible] around the plaintiff. They have been in attendance at a party given in honor of Mr. Floyd, who was President of the Fraternal Union of Joliet, Illinois. This dinner was held at the El-Ro Club, and was attended by twenty-five people. Some time prior to the festivities appeared about eight P.M. Mr. and Mrs. Hess did not arrive until nine P.M. The group ate dinner, danced and drank a few beers until the place closed at two A.M. After this the defendant, his wife proceeding in one car, and Mr. and Mrs. Hemmeser and Mr. and Mrs. Floyd driving in another car went to the Grand View Lunch Stand on Route 66A. At this stop this group

had some sandwiches and coffee. No beer. It was after their departure from this club and while proceeding south on Route 66A that the accident occurred. The defendant's car was driving immediately in front of Mr. Floyd's car, although Dodge testified that the Floyd car did not arrive at the scene of the accident until two minutes thereafter.

This group of six all testified at the trial and reported that the lights on the Haas car were burning at the time of the accident. The record is amazingly silent on the question as to how much drinking was done by the defendant and his party that evening. In the main, their testimony revealed that they had simply had the proverbial one or two beers. The trial court became a little impatient with the timidity of counsel in exploring the field of inquiry and started a little investigation of his own and developed this evidence.

(Abst. 57, Rec. 217) (Examination of Elrie Floyd):

Q. And what did you have to eat?

THE COURT: Pink tea.

THE WITNESS: Roast beef dinner, salads and that stuff.

(Abst. 58, Rec. 224) (Examination of Elrie Floyd):

Q. If you left the Hi-Ho Inn at two o'clock--

THE COURT: Some of these parties, were some of the parties a little tight, is that what it is all about?

THE WITNESS: I wouldn't say that any one was too tight. They wasn't drinking too much.

(Abst. 61, Rec. 240) (Examination of Mrs. Ruth Floyd:

Q. Who was riding with you? A. Mr. and Mrs. Mammosser.

THE COURT; Husky was sober? You didn't go to Chicago to Lockport?

THE WITNESS: No.

ted some sandwiches and coffee. [illegible]. It was after their departure from this club and while proceeding [illegible] on Route 65A that the accident occurred. [illegible] immediately in front of him. [illegible] that the Wright car [illegible] until two minutes thereafter.

This group of [illegible] testified [illegible] that the lights [illegible] the time of the accident. The record [illegible] as to how much drinking was done by the [illegible] that evening. In the main, their testimony was that they/simply had the proverbial one or two beers. The trial court seemed a little impatient with [illegible] in enlarging the field of inquiry [illegible] and developed this evidence.

(Abst. 87, Rec. 717) (Examination [illegible]):

Q. And were they drinking much?

THE COURT: Pink tea.

THE WITNESS: [illegible].

(Abst. 95, Rec. 790) ([illegible]):

Q. If you left the Whale [illegible]--

THE COURT: Some of those people, were any of the parties a little tight, is that what it is [illegible]?

THE WITNESS: I wouldn't say that any one was too tight. They wasn't drinking too much.

(Abst. 93, Rec. 749) (Examination of Mr. [illegible]):

Q. Who was riding with you? A. Mr. and Mrs. [illegible].

THE COURT: Where was [illegible]? [illegible] didn't go to Chicago to Lockport?

THE WITNESS: No.

The Trial Court in passing upon this matter and determining that the defendant was guilty and that the plaintiff was free of contributory negligence very clearly intimated that there probably was a great deal more drinking than the testimony actually revealed. He also intimated that there were a great many other places in the vicinity of the Hi Ho Club where this group of six could have had sandwiches and coffee without going to an all-night tavern and staying for an hour and a half. It was his conclusion that Haas was driving his car without lights and that was the sole contributory cause of the accident which precipitated this litigation. The trial court indicated great confidence in the integrity of the testimony of Dodge, the tax driver, who was entirely disinterested and observed the entire accident.

Thomas Mulvey, the driver of another taxi cab, was four blocks south of the intersection in question when he entered on Highway 66A, and he testified that when he looked north he saw no car coming with lights. The appellant insists that Mulvey was too far away for this testimony to be of much value. The evidence shows the Haas car had no front lights burning after the accident. It is contended by the appellant that this circumstance could be well explained by the damage done to the front of the Haas car as the result of the impact. The record shows that the right lamp on this car was destroyed, but that the left lamp was not in any way damaged. It is the appellant's contention that DeMitchell was guilty of contributory negligence, that he violated the terms of Sections 162, 164, 166, Chapter Ninety-five and a half of Illinois Revised Statutes, which reads as follows:

Sec. 162: When signal required

"(A) No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement."

"(b) A signal of intention to turn right or left shall be given during not less than the last 100 feet traveled by the vehicle before turning."

Sec. 164: Method of giving hand and arm signal.

"All signals herein required given by hand and arm shall be given from the left side of the vehicle in the following manner and such signals shall indicate as follows:

(1) Left turn--Hand and arm extended horizontally."

Sec. 166: Vehicle turning left at intersection.

"Any driver of a vehicle approaching an intersection with the intent to make a left turn shall do so with caution and with due regard for traffic approaching from the opposite direction and shall not make such left turn until he can do so with safety."

The trial court determined after hearing the witnesses that the defendant was driving his automobile on the night in question

without lights. It has often been said a trial judge is in a much better position to know where the truth lies than an Appellate Tribunal who have only the printed page before them. The trier of cases sees the witnesses as they testify, therefore, he is in a better position to determine whether or not they are telling the truth. The Judge could observe the expressions on their faces, the candor with which they spoke and their apparent sincerity or insincerity.

If the defendant's car was being driven without lights, then DeMitchell would not be expected to give a left turn signal. Violation of a statute will not defeat recovery unless such violation is considered in connection with all the other facts and circumstances concerning the case establishing negligence, and such negligence must have proximately contributed to the injury. Star Brewery Co. v. Hauck, 222 Ill. 348; Kenyon v. Chicago City Ry. Co., 235 Ill. 406; Graham v. Hagmann, 270 Ill. 252; Jeneary v. Chicago & I. Traction Co., 306 Ill. 392; Moyer v. Shaw Livery Co., 205 Ill. App. 273; Foglesong v. Peoria R. T. Co., 203 Ill. App. 546; Marx v. Chicago Daily News Co., 194 Ill. App. 322; Johnson v. Gustafson, 233 Ill. App. 216.

In light of the foregoing observations, we are convinced the trial court correctly disposed of the issues involved in this case, and that he entered a proper judgment. Judgment affirmed.

JUDGMENT AFFIRMED.

44501

CHARLES R. ADAMS, Appellee,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
ALFRED SILFEN, Appellant.	)	

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint against defendant for partnership accounting, dissolution, and the appointment of a receiver for the partnership assets. Defendant filed his answer denying the existence of a partnership, and alleging that the relationship of the parties was only that of employer and employee. The cause was referred to a master to report his conclusions of law and fact. The master made his report in favor of plaintiff, to which exceptions were filed and overruled by the chancellor. The decree was entered confirming the master's report, and directing the form of accounting, from which decree this appeal is prosecuted.

The chancellor fixed the appeal bond in the sum of $25,000 to operate as a supersedeas when approved and filed. The bond was never given nor was a supersedeas applied for. Upon the oral argument it was admitted that the accounting directed by the decree has proceeded almost to a conclusion.

The evidence is voluminous, and presents some conflict on the issue of the existence of a partnership. We have reviewed the evidence and find it abundantly supports the master's conclusion that there was a partnership, as alleged

in the complaint, and warrants the decree sustaining the master's report.

We would not be justified upon this review to interfere with the master's conclusions and the decree entered in accordance therewith, unless we are satisfied that they are against the manifest weight of the evidence. Pasedach v. Auw, 364 Ill. 491; Zarembski v. Zarembski, 382 Ill. 622, 632.

It is urged by defendant that the decree is erroneous in directing the sale of the entire assets, including the patents which defendant claims as a contribution to the partnership, and entitled to have that contribution returned to him under Section 18 (a), Chapter 106 1/2, Illinois Revised Statutes, 1947, (Uniform Partnership Act.) The evidence clearly demonstrates that the patents in question were developed and procured after the formation of the partnership and at the expense of the partnership. They are properly treated as a partnership asset, as any other accretion to the partnership assets would be regarded during the life of the partnership. The section of the Uniform Partnership Act, relied upon, has no application to these patents.

The decree of the Superior Court is correct and is accordingly affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.

44553

JOSEPH GREENWALD, Appellee, v. DAVID R. LIDSKER, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff, a real estate broker, brought suit for commissions claimed to be due him for obtaining a buyer, ready, willing and able to buy certain real estate owned by defendant and submitted by defendant to plaintiff for sale. There was a trial by jury and verdict for $2650 in favor of plaintiff. Judgment was entered thereon, and defendant appeals.

It appears from the testimony of plaintiff that he is a licensed real estate broker; that he met defendant at the Liberty State Bank, and defendant asked plaintiff to offer for sale a piece of property defendant owned; that defendant then furnished plaintiff all the particulars concerning location, rents and taxes, necessary in submitting a piece of property for sale, and asked him to procure a buyer for $55,000; that the property was clear; that defendant offered to procure a mortgage for $30,000 or $35,000 to secure the balance of the purchase price; that he informed plaintiff it would be difficult for plaintiff to contact him at all times, but that if he received any offer or check, he could submit it to defendant's brother, and that he would leave it to his brother to take care of it; that thereafter plaintiff procured a signed offer of purchase for $55,000,

together with a check for $2,000 to apply as a deposit on the purchase price, the balance of $53,000 to be paid upon the consummation of the sale; that plaintiff thereupon took the offer and check to the brother of defendant and gave them to him; that a day or two later defendant's brother returned the check and contract to him; that the property was later sold to another purchaser than the one procured by plaintiff. It was stipulated upon the trial that the fair and customary rate of commission in Chicago for a sale at $55,000, would be $2650.

Defendant admitted that he met plaintiff at the bank; that he submitted the property to plaintiff for sale at the price of $60,000 but not $55,000, as claimed by plaintiff; that he told plaintiff if he procured any offer less than $60,000 that he need not submit the offer, that he told him if he wanted any further information to go to the office of Lidsker and Forman at 3730 West Roosevelt Road; that Louis Lidsker, his brother, was one of the firm managing the property for him.

There is other conflict in the testimony of the parties and the witnesses, and it was within the proper province of the jury to determine the facts. Having done so, we should not disturb the verdict and judgment unless they are against the manifest weight of the evidence. We think the record presents purely a question of fact for the jury, and that the verdict is not against the manifest weight of the evidence.

Defendant argues that it was error to permit plaintiff to testify to conversations with the brother of defendant without proper proof of agency. If the jury believed plain-

tiff's testimony, there was sufficient evidence of authority from defendant to plaintiff to deal with defendant's brother in the submission of the written offer and the check.

It is also urged by defendant that the court erred in submitting to the jury the form of verdict with the amount $2650 inserted. There was no dispute, if plaintiff was entitled to recover, that that amount was the correct amount. It was so stipulated. Therefore, defendant was not prejudiced by the insertion of the amount in the form of verdict submitted to the jury.

We find no merit in the complaint made about the trial court's restriction in the cross-examination of plaintiff and other witnesses.

The judgment of the Municipal Court was correct and it is affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.

44677

SAM CHANDLER, Appellee, v. CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action against defendant for personal injuries resulting from a collision between an automobile, in which plaintiff was riding, and defendant's street car, at the intersection of Cottage Grove Avenue and South Parkway in Chicago. A trial with a jury resulted in a verdict for plaintiff for $1500, upon which judgment was entered. Defendant's motion for a new trial was denied, and defendant appeals.

Four reasons are assigned for a reversal of the judgment: (1) that the verdict is contrary to the manifest weight of the evidence; (2) that the court should have granted the motion for a new trial; (3) the refusal to give an instruction for defendant; and (4) the refusal to submit a special interrogatory to the jury.

South Parkway extends north and south, and Cottage Grove Avenue, upon which defendant's street car is operated, runs in a northwesterly and southeasterly direction, crossing South Parkway at 26th Street. At that point there is a three street intersection. South Parkway is divided into two drives, one for southbound traffic, the other for northbound. In between the two driveways is a parkway which separates them. 26th Street ends a short distance east of South

Parkway. Traffic lights control the traffic on each of the streets at said intersection. Plaintiff, who was a passenger in the automobile, and the driver Walker, testified in substance that when they started crossing Cottage Grove Avenue the green light was with them, and that the red traffic light was against the street car. Another witness for plaintiff, riding in the rear seat of the automobile, corroborated them. Witnesses for defendant testified to the contrary. Upon this question of the lights there was a sharp conflict and therefore properly a question of fact for the jury. Schneiderman v. Interstate Transit Lines, 331 Ill. App. 143, Affd, 401 Ill. 172; Bliss v. Knapp, 331 Ill. App. 45.

Defendant earnestly argues that the physical facts demonstrated by the evidence and by a plat appearing in the record clearly establish that the testimony of the witnesses for plaintiff as to the condition of the lights was inherently improbable, does not overcome the evidence produced by defendant, and the conclusion necessarily follows that the finding of the jury is against the manifest weight of the evidence. We cannot agree with defendant's contention. It does not give due weight to all reasonable inferences to be drawn from the evidence in favor of plaintiff as to the condition of the lights. It was equally within the province of the jury to determine whether the evidence proves the theory of defendant, that the witnesses for plaintiff were not in a position to see the green light at the time they started to cross Cottage Grove Avenue. The traffic light which plaintiff passed on South Parkway, before reaching the intersection of Cottage Grove Avenue, was not the only traffic light visible

to him and the others in the car. The jury might well have concluded that, at the time they entered the intersection of Cottage Grove Avenue the traffic light on the east side of South Parkway was to the rear of them, yet there were other traffic lights on the corners of the intersection which they could have seen. Upon that question we cannot invade the province of the jury.

Instruction No. 22, tendered by defendant and refused by the court, reads as follows:

> "The court instructs the jury that the burden is upon the plaintiff to show by a preponderance of the evidence that he was in the exercise of ordinary care just before and at the time of the alleged accident. And the court instructs you that he is not relieved from that duty because he was riding the automobile, but the law is that where a person riding in an automobile has an opportunity to learn of danger and avoid it, it is his duty to warn the driver of the automobile of such danger."

A similar instruction was held bad in Bliss v. Knapp, 331 Ill. App. 45, at p. 51. Lasko v. Meier, 327 Ill. App. 5. In Greene v. Citro, 298 Ill. App. 25, at p. 30, this court said:

> "If a guest were required at street intersections to look out and warn the driver of approaching cars, 'a most uncomfortable and hazardous position might be created for the driver of a car who happened to have several passengers as guests.' If all the passenger-guests should constantly be warning and directing the driver how to proceed he would be so distracted as to be unable to drive the car carefully. Back seat driving should not be encouraged."

Defendant argues that the court erred in refusing to submit the following special interrogatory:

> "Was the operation of the street car at the time and place in question negligent?"

We think Bess v. Curtis Publishing Co., 282 Ill. App. 625 (Abst.), disposes of defendant's contention adversely to it. In that case the complaint in all counts charged wilful and wanton conduct. The instructions given required the jury to find defendant guilty of wilful and wanton conduct before it could return a verdict for plaintiff. The defendant requested a special interrogatory which read:

> "Was the defendant Curtis Publishing Company, a Corporation, guilty of wilful and wanton conduct in the operation of the automobile at the time and place in question?"

This special interrogatory was refused. This court there said:

> "Undoubtedly, as a general rule special interrogatories requiring the finding of an ultimate fact should be submitted to the jury on request of either party. . Section 65, Civil Practice Act. * * * The special interrogatory was merely a duplicate of the ultimate question submitted to the jury."

Likewise, the special interrogatory in the instant case was a mere duplication of the ultimate fact the jury was required to find by their verdict.

What we have said disposes of the remaining question in the case - the refusal to grant a new trial.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Tuohy and Niemeyer, JJ., concur.

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44693

337 I.A. 655

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO
v.	)	MUNICIPAL COURT
NEP DOUSE, Jr., Plaintiff in Error.	)	OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff in error seeks to review a judgment entered after a hearing on an information charging him with assault with a deadly weapon with intent to inflict a bodily injury upon the person of James Sexton.

The court entered a finding of guilty in manner and form as charged in the information. This was followed by a judgment order on the finding of guilty, without specifying in the judgment order the name of the person assaulted. Defendant contends that the order is, therefore, defective. It is the established rule that the entire record must be considered. Hoch v. The People, 219 Ill. 265, 287. It appearing from the record that the information specifically charged an assault upon James Sexton, and the court having found defendant guilty in manner and form as charged in the information, the judgment is sufficient and it is therefore affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy., J., concur.

44693

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. NEP DOUSE, Jr., Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant in error appeals from a judgment entered after a hearing on an information charging him with assault with a deadly weapon with intent to inflict a bodily injury upon the person of James Sexton.

The court entered a finding of guilty in manner and form as charged in the information. This was followed by a judgment order on the finding of guilty, without specifying in the judgment order the name of the person assaulted. Defendant contends that the order is, therefore, defective. It is the established rule that the entire record must be considered. Hoch v. The People, 219 Ill. 265, 287. It appearing from the record that the information specifically charged an assault upon James Sexton, and the court having found defendant guilty in manner and form as charged in the information, the judgment is sufficient and it is therefore affirmed.

AFFIRMED.

Feinberg, P. J., and Tuohy, J., concur.

44724) consolidated
44725)

ROBERT SCOBBIE AND ELAINE SCOBBIE, Appellees, v. ED BURCH, Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals separately from orders entered in an action in which two plaintiffs joined their claims for damages for personal injuries based upon alleged negligence of defendant in the operation of an automobile. These appeals have been consolidated.

Plaintiffs' actions were instituted April 14, 1948; sheriff's return shows that summons was served on the same day by leaving a copy of the summons with defendant's wife at his usual place of abode in the county; June 15, 1948, order of default for want of appearance and answer was entered, with judgment against defendant in the sums of $5,000 and $750 for the respective plaintiffs. Immediately upon service of execution on the judgments he filed a petition supported by the affidavit of his wife alleging that he and his wife with their two children were living at 9230 Essex avenue, Chicago, until about the middle of January, 1948, when he separated from his wife and went to live at 2829 East 93rd street, Chicago, where he lived continuously until after the entry of judgment against him. On the hearing of his motion to vacate the judgment and set aside the default, he testified to

substantially the same effect. Two witnesses corroborate him. None dispute him. The uncontradicted evidence is that at the time of the service of the summons defendant was living at 2829 East 93rd street and not at 9230 Essex avenue, where his family continued to reside. 2829 East 93rd street being his actual place of residence, the summons was not left at his usual place of abode, as required by the statute.

The judgment is reversed and the cause remanded with directions to vacate the default judgment and quash the service of the summons.

REVERSED AND REMANDED
WITH DIRECTIONS TO VACATE THE
DEFAULT JUDGMENT AND QUASH
THE SERVICE OF SUMMONS.

Feinberg, P. J., and Tuohy, J., concur.

44650

ROBERT ANDREWS, a Minor, by his father and next friend, ALEX ANDREWS, Appellee,	)	
v.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Appellant.	)	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant to recover damages for injuries arising out of an accident which occurred at 103rd Street and Calumet Avenue, in Chicago, Illinois, at four o'clock P. M., October 4, 1944. From a judgment on a verdict for $6,200 defendant appeals . It complains (1) that the verdict is against the manifest weight of the evidence; (2) that the damages are excessive; and (3) that there was error in the refusal of an instruction and in argument.

Plaintiff, at the time of the accident, was thirteen years of age and a freshman at Mt. Vernon High School. He, accompanied by two other students, had alighted from the front end of an east bound bus which had stopped at the southwest corner of the intersection. At this point Calumet Avenue is 35 feet wide and 103rd Street is a four lane, heavily travelled highway.

Plaintiff testified substantially to the effect that the bus stopped two or three inches west of the crosswalk; that he alighted therefrom and started to cross the street from south to north in front of the bus; that he was accompanied by Robert Brow and John Fortino, his schoolmates;

that while they were walking in front of the bus the motor was gunned and the bus commenced to move forward; that he and his companions ran to avoid being struck; that an automobile driven by Milton Silverman was approaching from the west proceeding in the same direction that the bus was going; that they jumped back to avoid being struck by the oncoming automobile; that his left ankle was caught under the wheel of the oncoming car, about two feet beyond the north or left side of the bus; that he was struck by the front fender of the automobile, was thrown to the pavement and knocked eight or ten feet by the impact; that he was taken to the Roseland Community Hospital and Dr. Pape, the family physician, called to dress and bandage the elbows and knees. His knees were cut and bleeding, and his left ankle was swollen, broken, and "hurt very much." Plaintiff's story was corroborated, with some discrepancies, by his two companions.

For the defendant, the driver of the bus testified that the bus was at no time moved from the time that the plaintiff alighted therefrom until after the accident; that during this time the rear door of the bus was open; that the engine was not gunned because with the door open it was impossible to use the accelerator. The police officer testified that when he arrived at the scene after the accident, the bus was standing at the south curb, west of the west crosswalk of the intersection. Robert Manville, for the defendant, corroborated Fitzgerald, the driver of the bus, to the effect that it is impossible to move the bus or gun the engine while the rear door is open. Roland Loess, a teacher in the Ryerson School,

testified that he was near the corner of 103rd Street and Calumet Avenue; that he saw the bus pull up and stop; that the boys came out of the bus; that they were pushing and jostling each other and suddenly darted out in front of the bus; that the boys cut diagonally across the intersection toward a store on another corner; and that the bus did not move from the time the boys alighted until after the accident happened. Silverman, driver of the car which struck the boy, testified that the bus was standing still and the boy "darted out on a slight angle " into his car.

The evidence was sharply conflicting. If the story of the plaintiff, corroborated by his companions, is to be believed, that the bus started up while he was directly in front of the bus causing him to run in order to avoid being struck, there was a question of fact for the jury as to whether or not such conduct on the part of defendant was negligent and whether or not it proximately caused the accident, notwithstanding the bus did not strike the boy. If the story of the bus driver and defendant's corroborating witnesses is to be believed, then there was no negligence on the part of the defendant. We think that the question was one of fact for the jury, and are of the opinion that the verdict was not against the manifest weight of the evidence.

On the question of damages, Dr. Joseph Pape testified, without contradiction, that the plaintiff suffered a fracture of the medial malleolus (one of the bones of the ankle); that it was a complete fracture; that he first tried to reduce the fracture without surgery, manipulating it so he could bring it into alignment and put a cast on it; that he was not successful in this treatment, and four or five days after, he performed an operation which consisted of

opening up the ankle joint and sewing the ligaments together and then applying a cast; that, having done this, x-ray pictures were taken which showed that he had not gotten the anticipated results, and a second operation was necessary; that, the second time, a Vitalion metal screw was attached to the surfaces to hold them tight and in place, and the fractured bone was again put in a cast, where it remained for from four to six weeks; that three months later the pin was removed; that after the last cast was removed plaintiff had about 20% or 25% loss of movement in the joint; that plaintiff had been confined to the hospital about four weeks before he was discharged; that he continued to receive treatment for at least a year; that two months before the trial an examination showed that this ankle continues to swell up and that it is larger than the other ankle; that he has about 25% impaired movement and a scar; and that the impaired movement of his ankle is a permanent condition. Under these circumstances, we may not submit our judgment for the jury's, and hold that the $6,200 verdict is not excessive.

Defendant complains of the refusal of its tendered instruction which is in words as follows:

> "You are instructed that if you believe the defendant, Chicago Transit Authority, was operating its bus at the time and place in question in a lawful manner, and that the accident in question would not have occurred except for the negligent act of a third person, then you should find the defendant, Chicago Transit Authority not guilty, even though the plaintiff, himself, was not guilty of any negligence. The happening of an accident in itself does not in any way necessarily mean that the Chicago Transit Authority was guilty, and before you can find the said defendant guilty, you must find that the bus in question was operated negligently and that such negligent operation, if any, was the proximate cause of the accident in question."

It is our opinion that it was not reversible error to refuse this instruction. We think, under all the facts and circumstances here, it was confusing. The jury might well have concluded from this instruction that the defendant would not be liable if they believed that the accident would not have occurred except for the negligent act of a third party. This would ignore the well defined rule that if the negligence of the defendant is the proximate cause of the injury, the defendant is liable even though the accident might not have happened except for concurring negligence on the part of a third person.

Defendant complains of the argument of counsel for the plaintiff. We have carefully reviewed the arguments and are of the opinion that the statements complained of were made in answer to matters referred to by the defendant (Dunham v. Chicago City Ry. Co., 178 Ill. App. 186), and in any event, they were not such as to constitute reversible error.

The judgment of the Circuit Court of Cook County is therefore affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.

44687

CONSTANCE VIRGINELLI, Appellant,	)	
v.	)	APPEAL FROM SUPERIOR COURT,
CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Appellee.	)	COOK COUNTY.

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a passenger, charged defendant with negligence in its operation of a streetcar in Chicago, Illinois, as a result of which she was injured. From a judgment on a verdict finding the defendant not guilty, plaintiff appeals, raising two points: (1) that the verdict is contrary to the manifest weight of the evidence, and (2) that the argument of defendant's counsel was improper and constitutes prejudicial error.

The plaintiff, a 48 year old woman, testified that she boarded a street car at Sheffield and Clybourn avenues accompanied by her grandson and sat on a seat toward the front of the car; that it was a cold day; that the streets were wet and covered with snow; that she wore galoshes; that shortly before reaching her destination she arose and stood in front of the door on the iron step, "My foot was there and I held myself on the door, when all of a sudden they stopped so fast I don't know what happened. Then I found myself on the platform. Somebody picked me up." On cross-examination she said in describing the accident, "I know my both feet slipped, and I found myself on the floor; my head on the iron step. I do not remember the position I was in as I fell"; that "the street car started to go fast

again and then stopped pretty fast. *** Then he started to go faster again, and stopped all of a sudden."

The grandson testified that while the plaintiff was standing in the position described the streetcar sort of stopped and jerked and his grandmother fell and hit her head. On cross-examination he stated that it happened so fast that he could not explain how his grandmother fell but that the car sort of slowed down and then picked up and jerked. There were no other eyewitnesses to the accident produced by the plaintiff.

For the defendant, the motorman of the car testified that the car was being operated in a normal way; that there were no vehicles in front of the streetcar; that he was not stopped in the middle of the block; that he heard the woman fall. He was corroborated by the conductor and by a United States Post Office letter carrier who was a passenger on the car. The latter testified that the door leading from the inside of the car to the front platform opened up and a woman started to step out, that "she no sooner stepped out and she was laying on the floor. It happened very quickly." He stated that at the time she fell there was no traffic ahead, the street was clear, and the car was going along slowly at an even speed.

Clearly from the testimony it was a question of fact for the jury to decide whether or not the streetcar was being operated in a negligent manner, and we are unable to say that the verdict was against the manifest weight of

the evidence under all the facts and circumstances.

Complaint is made of the argument of defendant's counsel to the jury in several particulars, upon only one of which we deem it necessary to comment; and that is this language: "Now, ladies and gentlemen, in operating streetcars, after all they are yours, the Transit Authority. I don't know how a company can survive or exist for long if on such evidence one can come in on their word alone and say that a streetcar in the middle of the block gave a sudden lurch and jerk, causing me to fall and damaging. I want large sums of money. On that evidence, they cannot survive. They cannot endure; cannot give any service at all if those things prevail." We do not consider this proper argument. There is no proof in the record that the Transit Authority "are yours." The jury in arriving at the verdict were entitled to take into consideration only the evidence and the law as applied to the evidence and such an appeal to their self-interest is to be disapproved. However, no objections to this argument were made at the trial, and no reason is here urged that would take the case out of the rule (Pike v. City of Chicago, 155 Ill. 656) that objections not raised below may not be considered here.

Accordingly, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.

44728

JAMES F. KOHOUT, Appellee,	
v.	APPEAL FROM SUPERIOR COURT COOK COUNTY
CHARLES BLOOM, Appellant.	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in forcible entry and detainer against defendant for possession of a residence in Cicero, Illinois, on July 1, 1948 before a Justice of the Peace. On appeal to the Superior Court from a judgment for possession, plaintiff filed a motion for summary judgment supported by an affidavit, to which defendant filed a sworn counter affidavit. From a judgment for possession in favor of the plaintiff entered upon these pleadings, defendant appeals.

Plaintiff, the owner of the premises, contends that he seeks possession for the immediate and personal use and occupancy as a residence for his son and his son's family. Defendant contends that under the Housing and Rent Act plaintiff must state that he seeks possession "in good faith"; that he failed to so allege; and that the defendant's affidavit raises a question of fact which should be submitted to a jury as to whether or not the demand is made in good faith.

Supreme Court Rule 15 relating to affidavits in proceedings for summary judgment (Ill. Rev. Stat. 1947, Chap. 110, Par. 259.15) is in part as follows:

> "(1) Affidavits in support of and in opposition to a motion by plaintiff or defendant for summary judgment or decree shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the party relies; shall not consist of conclusions but of such facts as would be admissible in evidence; and shall affirmatively show that the affiant if sworn as a witness, can testify competently thereto. If all the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used."

The plaintiff's affidavit in the instant case, after alleging the service of notice of termination of tenancy, states substantially that he desires to recover possession of the house for the immediate and personal use and occupancy of his son, James G. Kohout, and his son's wife and child; that the son and family at the time of the service of the notice were residing in a six-room flat with the son's wife's mother, brother, two sisters, brother-in-law and nephew, a total of nine persons. Plaintiff's son filed an affidavit stating that he, his wife, and child are now living with his mother-in-law and five other adults; that he desires to live in the second floor flat of his father's property because of the crowded conditions under which he is now compelled to live.

The sworn counter affidavit, or as it is entitled, "Answer to Motion for Summary Judgment," asserts that the notice of the termination of tenancy is defective in that it does not recite that the plaintiff "in good faith is seeking possession of the premises." He denies that plaintiff desires to recover possession for the immediate and personal use and occupancy of his son, citing the fact that

the son has lived with his mother-in-law for three years under the same conditions that now exist. He says, "plaintiff has often complained that the said premises are not bringing enough rent, and if the plaintiff is successful in securing said premises he will make an effort to derive far more revenue from said apartment." The affidavit points out certain expenses which were incurred by the defendant's brother in decorating the premises. He says, "plaintiff has displayed continued animosity towards Louis M. Bloom and his family, and that because of this feeling of bitter animosity plaintiff desires to obtain possession of said premises." He states that the son could have had an apartment at an earlier date and refused it, that "if the son is living with his mother-in-law it is because of the desire to do so, as he had an opportunity to rent an apartment but refused it."

Defendant's objection to the effect that plaintiff does not state that he seeks recovery of the premises "in good faith" is without merit. The allegations in plaintiff's affidavit show the purpose for which the premises is desired. The statement of the conclusion that he desired the premises "in good faith" would add nothing to the facts alleged. If plaintiff wishes the premises for occupancy by his son's family because of the fact that they are now living under undesirable or unpleasant conditions, that in our opinion is sufficient ground to comply with the good faith requirement of the housing act. No allegations are contained in the answer to rebut these sworn statements of the plaintiff. The mere denial that plaintiff desires to recover possession is a conclusion which violates

Supreme Court Rule 15, supra. The fact that the son had been living with his mother-in-law for three years under the same conditions that exist at present raises no question of fact as to lack of good faith. Neither does the fact that there may be some personal animosity existing between plaintiff and defendant. The allegation "that plaintiff has often complained that the said premises are not bringing enough rent" would not be admissible in evidence as tending to prove that plaintiff in bad faith sought possession of the premises.

We have examined the entire answer and are of the opinion that it consists of conclusions of such facts as would not be admissible in evidence upon a trial. In the case of Killian v. Welfare Engineering Co., 328 Ill. App. 375, the court, quoting from the case of Shirley v. Ellis Drier Co., 310 Ill. App. 518, said:

> "'The court takes the affidavit of the plaintiffs and the affidavit of the defendant, compares both of them precisely as if the affidavits represented oral evidence of witnesses appearing on the witness stand, and then determines whether, if the evidence contained in the affidavits was orally submitted to the court, there would be something left to go to the jury. . . . If there would be nothing left to go to the jury, and the court would be required to direct a verdict, then a summary judgment will be entered.'"

We are of the opinion that there are no issues of fact raised by the counter affidavit here which would justify their submission to a jury. Accordingly, the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Feinberg, P. J., and Niemeyer, J., concur.

44463

JOHN PIFF, Plaintiff - Appellee, v. GEORGE P. BERRESHEIM, etc., JAMES P. HARDING, JOHN H. SASSER and MARY ROSE BRUMMEL, Defendants - Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

John Piff filed a complaint in chancery and an additional count thereto in the Circuit Court of Cook County against various defendants. By amendments the case continued against James P. Harding, Otto Mowry, John H. Sasser, Mary Rose Brummel and George Berresheim, individually and as successor trustee. Plaintiff alleged that on August 20, 1931, he contracted with the Foreman Trust and Savings Bank, as trustee, under Trust No. 4950, to purchase lots 9 and 10 in block 10 in Homerican Villas for $3,360; that he was credited with $2,240.06 for an equity in a contract dated August 20, 1928; that he completed his payments on June 27, 1933, and became entitled to a deed; that the bank became insolvent; that defendant, George P. Berresheim, became successor trustee; that from March 26, 1942, to October 4, 1945, plaintiff was in the military service; and that on October 30, 1944, Berresheim, as successor trustee, conveyed lots 9 and 10 in block 10 to Paul D. Angell. Plaintiff listed amounts which he paid for taxes beginning June 5, 1930, the last of such payments being made July 6, 1933. The payments plaintiff

alleges were made after he entered into the contract of August 20, 1931, aggregate $100.50. He alleges that the 56 lots in the subdivision were sold by Berresheim, the successor trustee, for $3,685, including plaintiff's 2 lots. The successor trustee agreed to pay a broker's commission of 5%. Plaintiff further avers that the other defendants authorized and directed Berresheim to make the deal whereby the real estate was conveyed to Paul D. Angell; that the persons who so authorized the conveyance of the real estate shared in the purchase price; and that plaintiff is entitled to an accounting and to a decree requiring the defendants to pay to him the total of the amounts paid by him, with interest thereon.

James P. Harding, Otto D. Mowry, John H. Sasser and Mary Rose Brummel filed an answer, the allegations of which Berresheim afterwards adopted. They allege that the trust was formed by Fred Brummel or John P. Harding, or both; that Fred Brummel died in 1941; that John P. Harding died in 1943; that James P. Harding succeeded to the interest of John P. Harding; that the other defendants, except Berresheim, succeeded to the interest of Fred Brummel; and that all the records of Fred Brummel and John P. Harding and of the Foreman Trust and Savings Bank had been destroyed. Defendants denied that plaintiff had made the payments. Defendants, except Berresheim, also denied the alleged payments for taxes. Berresheim admitted that the payments made and endorsed upon the contract were made. Defendants alleged that they had no notice or knowledge of plaintiff's claim until after the lots had been conveyed to Angell. The answer sets up laches, the five year statute of

limitations and the ten year statute of limitations; that plaintiff had abandoned the property, or that a deed had been executed and withheld from record by plaintiff. In their original answer the defendants, except Berresheim, admitted that the lots purchased by plaintiff were not conveyed to him, denied any repudiation of contract, tendered to him, plaintiff, a deed of conveyance for the lots and offered, at the direction of the court, to deliver the deed to plaintiff in open court. In a subsequent answer filed by these defendants they did not allude to their previous offer to deliver a deed. The answer further alleged that $185 was realized from the 2 lots. Berresheim stated that he acted purely as a clerk, that he never had any interest in the land, and that he had nothing in his hands as successor trustee. The court struck out all of the allegations except the allegation of laches. In a reply plaintiff alleged that the defendants might ascertain his interest from the public records showing that he paid taxes on July 6, 1933; that on June 27, 1933 Berresheim stated to him, plaintiff, that the deed conveying the 2 lots would be mailed to him; that two or three months later Berresheim told plaintiff that Berrsheim's principal was going to try to pay the special assessments on all the lots in the subdivision, which would save the owners about one half the amount due. This reply was ordered to stand as the reply to Berresheim. The case was heard before the chancellor, who entered a decree that plaintiff have judgment against defendants for $7,478.26. Defendants appealed.

The contract was made by Foreman Trust and Savings Bank, as trustee, under the provisions of a trust agreement dated October 17, 1927 and known as trust No. 4950. It was signed by the trustee as vendor and by the vendee, the vendor signing by Fred W. Brummel Company, as agent, by George J. Berresheim. The contract does not disclose the names of the beneficiaries of the trust. Berresheim afterwards became successor in trust to the bank and his name is signed to the receipts for payments endorsed on the contract on and subsequent to October 20, 1932, and to many other receipts before that date, and to the acknowledgment of full payment of the purchase price on June 27, 1933. Defendants were beneficiaries of the land trust because they so recited in the directions which they gave to the successor trustee, but when and how they became such is not shown. Paragraph 6 of the contract provides that all the covenants and agreements therein contained shall extend to and be obligatory upon the heirs, executors, administrators, successors and assigns of the respective parties.

Plaintiff alleged that Berresheim gave an option on 56 lots at a total price of $3,685. Berresheim agreed to pay James G. Lawrence a 5% commission. The option was exercised. Lawrence testified that he sold the lots and that the value was about $40 per front foot. The unpaid general taxes per lot are $240. The unpaid special assessments run from $1,500 to $2,200 per lot. Lawrence stated that he sold them at a price of $2 a foot, subject to general taxes and general assessments. From the record it is fair to say that lots 9 and 10 in block 10, each with a 40 foot frontage, yielded $160 gross, less $8 commission, or $152 net. Plaintiff testified that about two months after June 27, 1933, when he made

his last payment, he asked Berresheim for the deed; that the latter informed him that "the company" was going to buy up the special assessments and that they were going to pass the benefit thereof on to the land owners. In reply to the question: "What did you say in response to that?" plaintiff answered: "Well, it was all right because during that time you know there was depression, and so on"; and that he did not see Berresheim again. It was stipulated that both John P. Harding and Fred Brummel were dead. Plaintiff's contract contains no provision exonerating the trustee from personal liability. The gross value of the trust assets was $3,685.

The first point advanced by defendants is that neither the beneficiaries nor the successor trustee are liable for the sums paid by plaintiff to Fred Brummel or to the Foreman Trust and Savings Bank. In Bishop v. Bucklen, 390 Ill. 176, the court held that it is the rule in this state that a trustee is personally liable unless he expressly contracts against such liability. The contract on which plaintiff relies contains no provision exonerating the trustee from liability. The Foreman Trust and Savings Bank was not exonerated from personal liability. Berresheim was acting as a clerk for Fred Brummel. The evidence does not show that any money was ever received by the trust. It is not contended that any of plaintiff's money was in the trust when Berresheim became successor trustee. It does not appear that any of plaintiff's money was ever received by any of the defendants. Where the successor in interest to the vendor has not undertaken to perform the contract, or to save the vendor harmless, he is not liable except for the funds which he received.

While Berresheim receipted for 14 of the payments, he did so as a clerk. All payments were made to Fred W. Brummel Company, his employer. A servant cannot be held for money received by him and delivered to his principal.

Plaintiff argues that the clause in paragraph 6 of the contract that the covenants and agreements therein contained "shall extend to and be obligatory upon the heirs, executors, administrators, successors and assigns of the respective parties hereto" makes defendants liable. This clause, in the absence of an assumption of the contract, imposes no obligation upon the assignee of the vendor. Bimrose v. Matthews, 138 Pac. 319, 78 Wash. 32, Baker v. Zang, 275 Ill. App. 146. In Kneberg v. Green, 89 Fed. (2d) 100, the court, in speaking of the effect of this clause said that "the courts quite generally agree that the clause mentioned does not of itself impose an obligation upon the assignee to perform the contract." See also Southern Pacific Co. v. Butterfield, 39 Nev. 177, 154, Pac. 932; Lisenby v. Newton, 120 Cal. 571, 52 Pac. 813; Hugel v. Habel, 132 App. Div. 117 N. Y. S. 78.

The second point urged by defendants is that plaintiff cannot recover because he is guilty of laches. He waited from June 27, 1933 to March 26, 1942, when he entered the military service, a period of 8 years and 9 months. In the meantime, all the records were destroyed and the principals are dead. He could have had his deed at any time during this period. He has not paid any taxes on the real estate since July 6, 1933. After his conversation with Berresheim in August, 1933, he did not make any further inquiry. We find that under the circumstances the plaintiff is also barred from recovery under the doctrine of laches.

Plaintiff stated that defendants tendered a deed to him; that at the hearing defendants' attorneys admitted they were unable to make the tender good; that thereby defendants collectively admitted that plaintiff was entitled to a deed; and that he was not barred by any statute of limitations or laches. It is true that defendants Mowry, Sasser and Brummel alleged in their answer filed March 27, 1947, that they tendered a deed. By leave of court the answer was subsequently withdrawn. They then filed an amended answer in which the offer was omitted. Plaintiff did not throughout the hearing indicate that he would accept a deed. James P. Harding did not tender a deed, nor did Berresheim tender a deed. A tender made in a pleading is conclusive upon the pleader so long as the pleading remains in force. If the pleading is supplanted with another pleading in which the tender is not made, the allegation of tender has no further force. It may, however, be offered in evidence as an admission of the party. In the instant case it was not offered in evidence. See Niblack v. Adler, 209 Ill. App. 156. There is no merit in plaintiff's contention.

Plaintiff states that defendants' points should not be considered because of their failure to specify the errors relied upon for reversal. In Trust Company of Chicago v. Iroquois Auto Ins. Co., 285 Ill. App. 317, we held that assignments of error should not be placed in the brief. See also Stein v. Midway Chevrolet Co., 315 Ill. App. 105, and Pape v. Pareti, 315 Ill. App. 1.

For the reasons stated the decree of the Circuit Court of Cook County is reversed and the cause is remanded with directions to dismiss the complaint for want of equity.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY AND LEWE, JJ. CONCUR.

44534

THEODORE HARCK, Appellee, v. THE BORDEN COMPANY, a corporation, and ELMER HARTFORD, Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Theodore Harck filed a complaint in the Circuit Court of Cook County against The Borden Company, a corporation, and Elmer Hartford to recover for personal injuries sustained in a traffic mishap. A trial by jury resulted in a verdict against the two defendants for $2,500. Defendants' motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial were denied. Judgment was entered on the verdict and defendants appealed. The scene of the occurrence was at the intersection of Sangamon and 69th Streets, Chicago. It is a business district, with stores on all except the northwest corner of the intersection. On the northwest corner there was a large gas station and immediately adjoining it on the west was a funeral home. The east wall of the funeral home is 80 feet west of the west curb of Sangamon Street. Sixty-ninth Street, 42 feet, 2 inches wide, runs in an easterly and westerly direction, is paved with brick or granite blocks and has laid thereon westbound and eastbound streetcar tracks. The north rail of the westbound car tracks is 13 feet, 5 inches from the north curb. Sangamon Street, 30 feet, 4 inches wide, is paved

with asphalt, runs north and south and intersects 69th Street. At the southeast, southwest and northwest corners of the intersection the curb has a curvature of rather substantial radius, but on the northeast corner the east curb of Sangamon Street and the north curb of 69th Street meet in almost a right angle, the curvature at their junction having a radius of a little over one foot.

The mishap occurred at 7:30 A. M. on Tuesday, July 16, 1946. The sun was shining and visibility was good. Plaintiff, 23 years old, lived at 7249 Indiana Avenue, Chicago, about 2 miles southeast of the place of occurrence. He worked at a plant a little over 5 miles north and 3-1/2 miles west of his home, making the total distance from his home to work 8-1/2 miles. He had been riding a motorcycle to work for 3 months prior to the mishap. It took him 30 to 35 minutes to go from his home to the place where he worked. He was scheduled to commence work at 8:00 A. M. He could not remember whether prior to July 16, 1946, he had passed the intersection of Sangamon and 69th Streets, or whether he had turned off before reaching it. He would use the route where the traffic was less. Between 7:00 and 7:15 A. M. on July 16, 1946, he left his home for work, riding his motorcycle, which was rather new and in good condition. On its left handlegrip was the accelerator, which was operated by twisting it. The clutch was also on the left side. There were two brakes, both on the right side, one being on the right handlebar. The motorcycle had 4 gears. It was equipped with a pair of 1½ inch tubular steel protector bars toward

the front, and another pair to the rear. The purpose of the front bar was to protect the leg of the rider. Under the handlebars, at the rider's knee level, the forward pair projected straight out horizontally from the frame of the motorcycle a foot and a half or two on each side, to make the total width of the motorcycle at this point 3½ or 4 feet, or the same width as the handlebars. At their outer limits the protector bars turned and descended until they reached a point about one inch below the floorboard, on which the rider's foot rested, and then they turned in to the frame of the motorcycle. These forward bars were about 6 to 8 inches ahead of the rider's leg and projected outward from the frame of the motorcycle more than twice as far as the leg of the rider. The rear protector bars were back of the seat and were substantially similar to the forward pair, except that the rear pair projected out from the frame a few inches less than the front pair.

On the morning of the occurrence plaintiff stopped at a bakery 4 or 5 blocks east of Sangamon Street and then proceded west on 69th Street, traveling down the middle of the westbound car tracks. He believed there were a few cars parked along the curb in the block immediately east of Sangamon Street. Traffic was heavy. When he was about a block away he noticed the traffic at 69th and Sangamon Streets. There was a westbound streetcar standing at Sangamon Street taking on passengers. A westbound Borden truck was standing in the tracks immediately back of the streetcar. The truck was a 3½ ton wholesale milk truck, 7 feet, 6 inches wide, solid in back, so that only outside rear view mirrors gave a view to the rear. Plaintiff testified that he did not remember any cars being between him and the truck. Defendants'

witness, Albert W. Opel, testified that he was driving west, just behind the truck. As plaintiff traversed the last block east of Sangamon Street he intended to turn north on Sangamon Street to avoid the 69th Street traffic. When he was half a block or more east of Sangamon Street the streetcar started and the truck, a little late in starting, started slowly. The streetcar pulled away from the truck. The truck moved toward the south, across the track, so that its wheels were straddling the inside rail. Plaintiff concluded the truck was going to turn south on Sangamon Street and thereupon he decided to pass the truck and continue west on 69th Street. He had been watching the truck for a signal from the driver, but none was given at any time. At a point about 50 feet east of Sangamon Street plaintiff turned to the right from his previous line of travel down the middle of the westbound car tracks, and passed around the rear of the truck to a line of travel between the north rail and the north curb of 69th Street, about a foot or two closer to the rail than to the curb. There was no evidence that plaintiff gave any signal of his intention to pass the truck.

At the intersection the truck made a sharp turn to the north and the right front corner of the truck struck plaintiff's left leg. Plaintiff did not know until after the occurrence that the truck was going to turn north. Plaintiff's injury was a fracture of the fibula, about half way between the knee and the ankle, without any breaking of the flesh. The truck did not come in contact with any part of the motorcycle. The protector bar on the left side was not

bent or marked. Plaintiff testified that his motorcycle was damaged very slightly. The foot pedal on which plaintiff's foot rested was slightly bent. Plaintiff finally brought his machine to a stop with the right pedal against the curb, supporting the machine. Plaintiff testified that in the last 100 feet before the impact he did not twist his accelerator in either direction. He said he believed that either just before the mishap or during the mishap, he could not remember which, he had let up on the gas and put his motorcycle in second gear, and that he knew that it was in second gear during the mishap. Plaintiff was not thrown from his motorcycle. He testified: "I was swayed. There was quite an impact on my left leg, and it sort of swayed the whole motorcycle. I swerved, regained control and drove half a block down and stopped." He testified that he stopped with his gear, and that he could not operate his clutch. He did not claim any inability to use either of the two brakes. He further testified he stopped his motorcycle, still in an upright position, about half way between the funeral home and the gas station, and explained that by half way he meant closer to the funeral home than to the gas station. According to plaintiff's Exhibit 3, a plat of the scene, the closest point of the funeral home is 102 to 110 feet west of the point where the truck turned into him.

The truck driver, Elmer Hartford, testified that he was going between 5 and 12 miles per hour; that he looked in his two rear vision mirrors, one on the outside of the truck on either side; that he saw no traffic and therefore gave no signal of intention to turn; that almost immediately upon turning he felt an impact, at which time he had turned north

from his original westerly line of travel, not more than 3 feet; and that after the impact he moved 5 feet or less before bringing his truck to a stop at a point where the front end was about even with the north curb of 69th Street and that the motorcycle moved about 80 feet after the impact. Apart from the two drivers, there were two eyewitnesses, Albert W. Opel and Albert L. Froling, both of whom were called in behalf of defendants, and from each of whom an investigator for plaintiff's attorney took a statement soon after the occurrence. Opel testified that he was driving west on 69th Street and that when he was about 75 feet east of Sangamon Street he saw the Borden truck about 75 feet ahead, standing still. On direct examination he stated that his own speed was 10 or 12 miles per hour, but on cross-examination he recalled that in a statement given soon after the occurrence to an investigator for plaintiff's attorney, he said he was going from 15 to 18 miles per hour. This witness stated that the truck stood for not more than 5 or 6 seconds, and that he, Opel, first became aware of plaintiff's motorcycle after the truck started to move. His attention was called to the motorcycle by both seeing and hearing it alongside his automobile on the right side. Opel stopped so that he would not be involved. He saw the impact and placed it on a line with the north curb of 69th Street and 7 or 8 feet west of the east curb of Sangamon Street. He stated that after the occurrence the motorcycle stopped about 30 or 35 feet away from the truck. More specifically, he identified the place where it stopped as about 25 feet west of the west curb line of Sangamon Street.

Albert L. Froling saw the occurrence while standing in a tavern on the northeast corner of Sangamon and 69th Streets, looking out the window to the south. His position was about 12 feet north of the north curb of 69th Street. He saw the streetcar and the truck and then saw the motorcycle trying to pass the truck. He testified that when the truck reached the east curb line of Sangamon Street it made a right turn, and that at that time the motorcycle came along between the rail and the curb and that the two vehicles came together at the corner. He did not actually see the impact. He testified further that there was a sewer about 8 or 10 feet east of where the truck was turning; that it was immediately east of the east crosswalk on Sangamon Street and directly in line in front of the tavern; that it extended out in the street a foot and a half or two from the north curb; that the curb adjacent to the sewer was 6 or 7 inches high; that to the west of the sewer the surface of the 69th Street pavement was built up to about level with the top of the curb; that when the motorcycle reached the place where the sewer was, both the motorcycle and the rider bounced; that he believed it then started to swerve. He assumed that the motorcycle hit the sewer, but acknowledged that it might have hit some other rough surface in the pavement at that point. He stated further: "He was going fast. Well, I don't know exactly how fast, but he was cutting around the truck, and when he hit the sewer I noticed the motorcycle bounce and he started swerving then." He testified further that after the impact the motorcycle weaved west on 69th Street and that it finally stopped 100 to 125 feet beyond the point of impact and in front of the undertaking parlor.

Defendants concede that the question of their negligence is one on which the jury might have concluded as it did. The burden was on the plaintiff to prove that he was in the exercise of due care and caution for his own safety. This burden is not met by the absence of evidence or by evidence that equally infers two inconsistent conclusions. Defendants maintain that plaintiff failed to sustain the burden of proving that he was operating his motorcycle under proper control and at a reasonable rate of speed in view of the conditions prevailing at the intersection; that there is no evidence that he was operating his motorcycle at a reasonable rate of speed; and that the evidence shows, instead, that he was driving at an excessive speed and without having his vehicle under proper control. Defendants state that as there is no evidence tending to support an essential element of plaintiff's case, the judgment should be reversed and a judgment entered for them. They call attention to the fact that Sec. 49 of the Uniform Act Regulating Traffic on Highways (Par. 146, Ch. 95½, Ill. Rev. Stat. 1947) specifies that in a business district, such as the scene of this occurrence, any speed in excess of 20 miles per hour is <u>prima facie</u> excessive; that plaintiff, as part of his burden of proof, should have shown the speed at which he was driving; and that if he was exceeding 20 miles per hour, then the burden was also upon him to show that his actual speed was reasonable. Defendants, citing Sec. 57 of the same act (Par. 154, Ch. 95½, Ill. Rev. Stat. 1947) that one vehicle may pass another traveling in the same direction on the right hand side if the roadway is of sufficient width to permit such movement to be made in

safety, assert that there was evidence that the street was wide enough for plaintiff to pass on the right, but there was no evidence that the movement could be made in safety; that there was evidence that when he was 50 feet east of Sangamon Street plaintiff concluded that the truck was going to turn to the south, but there was no evidence of any exercise of due care on his part from that point up to the point of impact; and that proper observation and care on his part would have prevented the mishap, which is shown by the fact that just as plaintiff drew alongside the car of Opel, the latter saw that there was going to be an "accident" and stopped his car in time to avoid being involved.

Plaintiff calls attention to Sec. 62 of the same act, (Par. 159, Ch. 95½, Ill. Rev. Stat. 1947) which provides that the driver of a vehicle intending to turn at an intersection shall do as follows:

"Both the approach for a right turn and a right turn shall be made as close as practical to the right hand curb or edge of the roadway."

He also calls attention to Sec. 65 (Par. 162, Ch. 95½, Ill. Rev. Stat. 1947), which provides that no person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and after giving an appropriate signal in the manner thereinafter provided in the event any other vehicle may be affected by such movement, and that a signal or intention to turn right or left shall be given not less than the last 100 feet traveled by the vehicle before turning. No attempt was made by defendants to comply with either of these enactments. In

our opinion the jury had a right to find that the sole cause of the mishap was the violation of the two last mentioned sections of the statute. At the request of defendants the following special interrogatory was submitted to the jury: "Could the plaintiff, by the exercise of ordinary care for his own safety, under all the circumstances which you find from the evidence, surrounded him at the time of the accident, have avoided the accident and injuries complained of?" The jury answered this interrogatory in the negative. No point is made that the interrogatory is not supported by the evidence. Our view is that the jury had a right to find that the plaintiff in driving his motorcycle along 69th Street did not violate either Sec. 49 or 57 of the Uniform Act Regulating Traffic on Highways.

We agree with plaintiff that there was evidence that he exercised due care for his own safety. Plaintiff testified that he observed the traffic at the corner when he was a block away; that as he traveled this block he was observing the truck; that during that period he was slowing down; that when the truck started up it started south across the tracks; that this action of the truck caused him to believe that it was going to turn to the south; and that he therefore attempted to go around the truck on the right. He stated that until the time he turned out to go around the truck, he watched for a signal from the truck driver and that none was given. He also stated that after he was struck on his left leg he maintained control of the motorcycle and ran it over to the curb and that the motorcycle at no time fell over.

We agree with plaintiff that defendants are estopped to complain because the record is silent as to plaintiff's rate of speed. During the trial Opel, one of defendants' witnesses, testified that immediately before the occurrence plaintiff's motorcycle passed his car. On direct examination he was asked: "Now then, did you see a motorcycle there?" and answered: "I didn't at that moment." He was then asked: "Did you thereafter?" to which he answered: "I certainly did." He was then asked: "Where was it when you first saw it?" to which he answered: "Alongside of me." He was then asked: "Was your attention directed to it by seeing it or by hearing it or by something else?" to which he answered: "Both seeing and hearing it." To the question: "What did you hear?" he answered: "I heard the roar of a motorcycle go by me." He was then asked: "And then what did you see?" to which he answered: "I saw a collision." On direct examination witness further testified that he had driven automobiles for 30 years and could estimate the speed of motor vehicles. He gave his opinion as to the speed of the truck. On cross-examination witness said he (Opel) was going "real slow, about 10 or 12 miles an hour, not any faster, and he just started to run." On cross-examination he was asked: "All right, could you give us an opinion as to the speed the motorcycle was going?" An objection by the attorney for defendants that the question was not proper cross-examinatio was sustained. Defendant has cited cases holding that an

estimate of speed may not be based upon the exhaust of the automobile or the noise made by it as it approaches the scene of the mishap. In the instant case the witness testified that he saw and heard the motorcycle. He described its movements up to the time of the occurrence and until it came to a stop. It is reasonable to infer from his direct examination that the witness heard the roar of the motorcycle and saw it as it went by him and that at that time the motorcycle was moving faster than witness' car. If the intent of the plaintiff in asking the question which elicited the answer that he heard the roar of the motorcycle go "by me" was not to give an impression as to the speed at which the motorcycle was being driven, then it is difficult to understand the purpose of the question. We find that the cases cited by defendant are not applicable to the factual situation presented by the record in this case. We are of the opinion that Opel, when testifying that the motorcycle passed his car with a roar, might leave the impression on the jury that the "roar" was caused by the speed at which the motorcycle was moving. Cross-examination should not be unduly restricted. Under the circumstances,

We agree with plaintiff that defendants are estopped to complain because the record is silent as to plaintiff's rate of speed. During the trial Opel, one of defendants' witnesses, testified that immediately before the occurrence plaintiff's motorcycle passed his car. On direct examination he was asked: "Now then, did you see a motorcycle there?" and answered: "I didn't at that moment." He was then asked: "Did you thereafter?" to which he answered: "I certainly did." He was then asked: "Where was it when you first saw it?" to which he answered: "Alongside of me." He was then asked: "Was your attention directed to it by seeing it or by hearing it or by something else?" to which he answered: "Both seeing and hearing it." To the question: "What did you hear?" he answered: "I heard the roar of a motorcycle go by me." He was then asked: "And then what did you see?" to which he answered: "I saw a collision." On direct examination witness further testified that he had driven automobiles for 30 years and could estimate the speed of motor vehicles. He gave his opinion as to the speed of his own car and the speed of the truck. On cross-examination he was asked: "All right, could you give us an opinion as to the speed the motorcycle was going?" An objection by the attorney for defendants that the question was not proper cross-examination was sustained. We agree with plaintiff that the witness Opel, when testifying that the motorcycle passed his car with a roar, would be likely to leave the impression on the jury that the "roar" was caused by the high rate of speed at which plaintiff was traveling. Under the circumstances,

plaintiff's attorney had a right to cross-examine the witness on his estimate of the speed of the motorcycle, and the court should have permitted the question. Therefore defendants are not in a position to complain that the record is silent as to the number of miles per hour the motorcycle was traveling. In Owen v. Crumbaugh, 228 Ill. 380, a will contest case, complaint was made because there was no evidence as to certain beliefs of spiritualists, which was material in the matter before the court. The Supreme Court said (page 408):

"This point is not available to contestants, since proponents asked Dr. Warne to state the belief of his association on this point, and the contestants objected and the objection was sustained. Contestants will not be permitted to profit by the absence of evidence which was excluded on their objection."

In Kelly v. Chicago City Railway Co., 283 Ill. 640, the court said (645):

"As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Bale v. Chicago Junction Railway Co., 259 Ill. 476), but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant. This is not one of those cases."

We conclude, as did the Supreme Court in the Bale and Kelly cases, that in the instant action the issue of plaintiff's due care was properly submitted to the jury. There was competent evidence from which the jury could decide that plaintiff exercised due care. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.

44591

AMERICAN ROOF TRUSS COMPANY, a corporation,

Plaintiff - Appellee,

v.

ALBERT C. GOLK and LAURA GOLK, his wife, THOMAS LOURY, doing business as LOURY CONSTRUCTION AND LANDSCAPING COMPANY, THOMAS HOIST COMPANY, a corporation, LIBERTY NATIONAL BANK OF CHICAGO, as Trustee under Document No. 13825998 and "UNKNOWN OWNERS,"

Defendants,

On Appeal of ALBERT C. GOLK and LAURA GOLK, his wife,

Defendants - Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

ON REHEARING

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

American Roof Truss Company, a corporation, as a subcontractor, filed a complaint and an amended complaint in the Circuit Court of Cook County to declare and foreclose an alleged mechanic's lien against Albert C. Golk and Laura Golk, his wife, the owners, Thomas Loury, the general contractor, and others. Answers and a reply were filed. The cause was referred to a master in chancery, who heard evidence and submitted a report finding that plaintiff has a prior and superior lien and recommending foreclosure thereof. Objections to the report which were overruled by the master were ordered to stand as exceptions. The chancellor entered a decree overruling the exceptions, approving the report and directing the foreclosure of the alleged mechanic's lien. Albert C. Golk and Laura Golk appealed. For convenience we will refer to Mr. and Mrs. Albert C. Golk as defendants.

In its brief plaintiff, under the title of "Additional Facts," states that the agreement under which it did the work is signed by the contractor and the owners. There was no finding that plaintiff was other than a subcontractor, nor does the decree find that defendants are obligated to plaintiff by virtue of signing the contract between plaintiff and the contractor. Plaintiff did not except to the master's report or assign cross errors. Therefore, it is unnecessary to discuss the effect of defendant's signature on the contract between plaintiff and the general contractor.

The decree found that the final completion date on which plaintiff furnished labor and material in the construction of the roof under its contract with Loury was October 8, 1946, and that on November 29, 1946, plaintiff duly served its notice of subcontractor's lien on Albert C. Golk personally, which constituted good service thereof upon the defendants. Defendants maintain that the findings of the decree (a) that on November 29, 1946 plaintiff duly served its notice of subcontractor's lien on Albert C. Golk personally, and (b) that the final completion date of its contract with the general contractor was October 8, 1946, are against the manifest weight of the evidence. The parties argue these and collateral points. We have carefully read and considered the pleadings, the transcript of the evidence, the exhibits, the master's report, the briefs and the authorities cited. In the view we take of the case it is only necessary to discuss the point advanced by defendants that the finding that they were duly served with notice of a subcontractor's lien on November 29, 1946, is against the manifest weight of the evidence.

Albert C. Golk is in the cartage business with an office at 832 West Fulton Street, Chicago. He and his wife, Laura Golk, as joint tenants, purchased a parcel of real estate at the southwest corner of Fulton and Carpenter Streets, located about a quarter of a mile west of Mr. Golk's office. Defendants employed Thomas A. Loury to erect a garage building on the land and several separate contracts were executed by them for the construction of the building. They entered into a written contract with Loury whereby he agreed to furnish a five truss roof (manufactured by plaintiff) for the building on a cost, plus material and labor basis, plus a percentage supervision charge. It is undisputed that Mr. Golk acted and was the duly authorized agent of his wife in the making of the improvements and that valid service of the lien notice on him as her agent would be binding on her. The parties are in agreement that the law is that a subcontractor's notice must be served personally and that service by mail is insufficient. See Carney v. Tully, 74 Ill. 375, and Agles v. Stolze Lumber Co., 260 Ill. App. 14. It was essential, as a foundation to plaintiff's right to a mechanic's lien, that it prove by a preponderance of the evidence that it served its notice of claim personally. Plaintiff, with offices at 6850 Stony Island Avenue, Chicago, entered into a contract with Loury, the general contractor, to furnish and erect on the building five American Bowstring wood trusses at a price of $5,486. It insists that it served the defendants personally with the subcontractor's lien notice by delivering a copy thereof personally to Mr. Golk for himself and as agent for his wife, on November 29, 1946, at 2:45 p.m. The original lien notice, a

copy of which plaintiff asserts it served on the defendants, is dated November 29, 1946, and states that there was then due to plaintiff the sum of $4,040.

Plaintiff's president is William H. Waddington and the vice president is his son, Raymond J. Waddington. The latter was the only witness to testify for plaintiff on the issue of service of the lien notice. On direct examination he testified that he had seen plaintiff's Exhibit 29 (lien notice) before; that it bore the genuine signature of his father; that on November 29, 1946 he went to see Mr. Golk at the latter's office; that he took with him the original notice of lien and a copy; that when he arrived Mr. Golk was the only one there; that he was very busy; that he was talking on both telephones, which was one of the incidents that helped him to place this particular set of facts in his mind; that while he was talking on the telephone witness waited for him to get through; that it took quite a while; that as soon as one telephone stopped the other would ring; that when he was through witness handed him a copy of the notice of lien; that witness stepped back and noted the time and date on the back of it; that when he handed Mr. Golk the notice he said to him: "This is a notice of Lien"; that he made a notation on the original of the time he served it, "2:45 p.m. November 29, 1946," which appears in black ink on the back of plaintiff's Exhibit 29; that he made the notation with his own pen immediately after he served the lien; that he previously had occasion to serve notices of subcontractor's lien upon owners of property; that it was his custom to personally serve the notices on the

owners; that Mr. Golk said he was very sorry about everything; that plaintiff did a good job on the trusses; and that he had not paid because he had already overpaid Loury.

On cross-examination, Raymond J. Waddington testified that he did not remember where he was on the morning of November 29, 1946; that he didn't recall being in the office on that morning at about 10 or 11 o'clock; that he didn't remember distinctly where he came from on that afternoon to go to Mr. Golk's place of business, but he believed it was from plaintiff's office; that he didn't distinctly remember what time he left the office; that he got plaintiff's Exhibit 29 at the office; that it was made up by the bookkeeper; that he got two of them; that he didn't remember whether they were attached; that his father handed them to him, but he doesn't remember where he was when his father handed them to him; that he was in the office; that he doesn't remember distinctly what day, but thinks it was November 29, 1946; that he doesn't remember the time of day that his father handed them to him, but it might have been in the morning; that he didn't remember the exact time at all; that he doesn't remember whether the exhibit was handed to him on November 29, 1946; that it was a long time ago; that witness read them; that he got two of them; that he got plaintiff's Exhibit 29 and another one and that the other was a duplicate; that he doesn't remember whether the other one was a carbon copy or not; that he looked at them and read both of them, but can't tell now whether a carbon copy or original was given him; that when the two were handed to him he doesn't remember distinctly whether he put them in a file or put them in his pocket; that he went out to Mr. Golk; that he doesn't remember

the exact location at that time, but knew how he got there; that when he got there, Mr. Golk was there; that Mr. Golk, Jr. was not there; that he doesn't remember distinctly whether his father was in town "at that time, on that day," although he testified a short time previously that his father had handed him the two exhibits; that he didn't remember whether it was the same day, November 29, 1946, but he imagined it was the same day; that he was at Mr. Golk's office on November 29, 1946 about "half an hour, twenty minutes"; that the notation "To Golk, Sr." in pencil on the back of plaintiff's Exhibit 29 is in his father's handwriting; that he doesn't remember whether it was on there at the time he went out to Mr. Golk's place of business on November 29, 1946; that this was true though witness purported to have written in ink down there directly below the notation; that he didn't know whether that pencil notation was on there; that he doesn't remember whether the notation "R.J.W." was on there at the time he went out there; and that he doesn't remember whether he looked on the back of the other copy that he had, so he doesn't know what was on the back of it.

Under cross-examination this witness further testified that when he was in Mr. Golk's office he doesn't remember whether Exhibit 29 was folded or not; that he doesn't remember whether the copy was folded or not, although he looked at it; that the seal in the lower left hand corner is the seal of plaintiff; that he doesn't remember whether the seal was on the other copy; that his father's signature is on the exhibit and was on the other copy; that witness sees the two holes

punched at the top of the exhibit; that he doesn't remember whether the copy had holes punched in it; that witness finally went to a lawyer; that the witness's signature is on the complaint, opposite the notary's seal; that when he went to the attorney he handed him Exhibit 29 some time or other; that the attorney drew up the papers; that witness came in and read over the complaint; that on page 6 thereof witness says that he has read the bill and "the foregoing statements by him subscribed"; that in paragraph 8 of the original complaint where he states "that on the 29th day of October, 1946 the plaintiff delivered to and personally served upon Albert C. Golk and Laura Golk, his wife, the owners of the above described premises, a notice of claim for lien, a true copy of which is attached to the complaint as Exhibit 'B'," witness doesn't remember that although he read the complaint over before he signed it; that he also looked over plaintiff's Exhibit B attached to the complaint; that he looked at the whole thing; and that witness's statement in paragraph 8 of the complaint was bad reading on his part.

To controvert the testimony as to service on the afternoon of November 29, 1946, defendants introduced six witnesses, two of whom testified only as to a collateral matter. Albert C. Golk testified that he received defendant's Exhibit 20, purporting to be a notice of sub-contractor's lien, in the mail around December 6th or 7th, 1946; that he received it about a week after Thanksgiving; that it was never handed to him personally; and that he was not at his place of business on the afternoon of November 29, 1946. Thanksgiving Day was observed on Thursday,

November 28, 1946. Witness states that he was at his place of business Friday, November 29, 1946 until about 11:45 a.m.; that it was the day after Thanksgiving; that it was not a busy day in his business, because hauling by carlots is all over before Thanksgiving and that Friday and Saturday are particularly quiet; that he received a call that morning from Herman Bollmann, a friend of his; that Bollmann called to make an appointment; that Bollmann said, "I will see you out at Jake's"; that witness left the office at 11:45 a.m.; that he drove to North Avenue and Ridgeland to Jacob Loibl's tavern; that he arrived at the tavern he "imagined" between a quarter after and half past twelve; that when he arrived Mr. Bollmann was sitting there at the bar talking to Jake; that they remained at the tavern until around three o'clock; that they then went to Franklin Park to the DeLuxe Gardens; that they remained there just a few minutes; that they then went to the Chi-Oak Inn at Chicago and Oakley, where they remained until a little after 5:00 p.m.; that at 5:00 p.m. witness went home and Bollmann went to pick up his girl friend; and that witness did not go back to the office that day. Mr. Golk was cross-examined. We are not detailing the cross-examination as we have concluded that it did not shake his testimony in chief. There was no attempt to cross-examine the witness as to his movements on November 29, 1946, after he left his office and went out to Jacob Loibl's tavern, nor was there any attempt to impeach the witness.

Mr. Golk's testimony as to his movements on Friday, November 29, 1946 is corroborated by H. C. Bollmann. He is employed at the Mack Truck plant as a pick-up driver and

had been so employed for five years at the time he testified. He recalled the weekend of Thanksgiving, 1946. He did not work on November 29th or 30th. Ordinarily, he worked on Fridays and Saturdays at that time. He knew Mr. Golk 30 or 35 years. Mr. Bollmann testified that he was at the tavern about 12:15 noon on November 29th; that Golk came in about 10 or 15 minutes thereafter; that he called Golk earlier in the day to make the appointment; that he had called him from a drugstore at Division and Austin Boulevard; and that they left the tavern a little after 3:00 p.m. He supported Golk's testimony as to their movements on that afternoon and said that they left the Chi-Oak Inn at about 5:00 p.m.

The testimony of Golk and Bollmann was corroborated by that of Jacob Loibl and Albert C. Golk, Jr. The latter testified that on November 29, 1946, the day after Thanksgiving, he was down at work; that in the morning he did the same as always; that his duties were directly outside of the office; that he went into the office on that day between 11:15 and 11:30 a.m.; that his father washed up and left the office somewhere between 11:30 and 12 o'clock; that witness spent the rest of the day in the office; that he was in the office all the time until 6:30 or 7:00 p.m. that night; that his father did not come back to the office that day; that witness did not see Mr. Waddington that day at all; that Mr. Waddington did not hand him any notice of lien or anything; that he did not hand his father any notice of lien at 2:45 p.m. that day; and that he next saw his father on Saturday morning. Witness further testified that on November 29, 1946, his wife worked in the morning; that that afternoon she was a passenger on an airplane to

St Louis; that this is the way witness fixed the date; and that she came back from St Louis on Sunday, December 1st, at about 1:30 p.m. Albert C. Golk, Jr. further testified that he went out to plaintiff's office on December 5th or 6th; that he had never been out there before; that he has not been there since; that the first time he ever saw defendant's Exhibit 20, a copy of a notice of lien, was about a week after he was at plaintiff's office; that witness had come in from the outside; and that witness came into the office and his father showed it to him. This witness was not cross-examined upon any of the foregoing testimony, nor was any attempt made to impeach him. Leona Golk, his wife, testified that on the afternoon of November 29, 1946 she and Mrs. Lillian Chapman went to the Municipal Airport and that they went by airplane to St Louis. Defendants introduced their Exhibit 28, her airplane ticket. She came back via the air line the following Sunday, December 1st. She was not cross-examined, nor was any attempt made to impeach her. Mrs. Lillian Chapman testified that she accompanied Mrs. Golk on the airplane journey to St Louis, but that she returned a few days later.

There is no testimony in the record to corroborate Raymond J. Waddington's story. He testified that he doesn't distinctly remember what day, but thinks it was November 29, 1946, when his father handed the notice of lien and copy to him. The father failed to corroborate this testimony. The father testified that Albert C. Golk, Jr. and Thomas Loury were out to plaintiff's office on November 29, 1946, which was the same day Raymond J. Waddington testified he served the notice of claim for lien. On cross-examination, the

father testified that he didn't know what his son did on November 29, 1946, and that he didn't know that his son was in town that day. Raymond J. Waddington testified that plaintiff's Exhibit 29 was made up at plaintiff's office on November 29, 1946 by a bookkeeper, but plaintiff failed to produce the bookkeeper to corroborate this story. We agree with defendants that none of their witnesses was impeached or discredited. Albert C. Golk's movements on November 29, 1946 are accounted for. The fact that Golk was in the business of hauling meat and that by Thanksgiving all of the hauling would be done so that Friday and Saturday thereafter would be particularly quiet, would make it natural and probable that he would take the afternoon off to relax and visit with his friend. Bollmann also had Friday and Saturday off at this time. The fact that he was off from work on this particular Friday and Saturday would be consistent with the fact that it was the Friday and Saturday after Thanksgiving. Mr. William H. Waddington, after testifying about a conversation at plaintiff's office on the morning of November 29, 1946, wherein Mr. Golk, Jr. was present, stated that in a deposition for discovery taken on April 28, 1947, in answer to the question as to whether he recalled the date of the conversation, he answered: "Yes, it could be in December or November; I don't recall." In answer to the further question "Was that in the early part of December, 1946?" and whether he answered, "I don't remember the date A. C. Golk was at my office," he replied: "I don't remember."

Mr. Albert Golk, Jr. denied that he was at plaintiff's office on November 29, 1946. We find that the evidence, exhibits and surrounding circumstances support defendants' position that Mr. Albert Golk, Jr. was not at a conference at plaintiff's office on the morning of November 29, 1946. The documents introduced by plaintiff and the so-called surrounding facts do not support plaintiff's allegation of service of lien and do not overcome the unimpeached testimony establishing that Mr. Golk, Sr. was not at his office the afternoon on which plaintiff claims he served him personally.

In Larson v. Glos, 235 Ill. 584, the court said (588):

> "A master has some advantage in being able to see and hear the witnesses, where he, in fact, does so; but he may have considered incompetent evidence or failed to consider competent evidence, and, in any event, his findings are only prima facie correct. It is only where the court has heard the evidence and decided the case that we have refused to disturb the finding unless it was clearly and manifestly against the weight of the evidence. This court has never adopted the rule that a master's report is to be given the same effect as the verdict of a jury in a case where the parties have a right to have issues of fact determined by jury. Fairbury Agricultural Board v. Holly, 169 Ill. 9; Ennesser v. Hudek, id. 494."

In Borovansky v. Para, 306 Ill. App. 60, we said that the master in chancery saw the witnesses and heard them testify; that it was his province to determine the facts; that while his findings do not carry the same weight as the verdict of a jury, or of a chancellor, where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause; and that where his conclusions as to the facts have been approved by the chancellor, we are not justified in disturbing his findings unless they are against the manifest weight of the evidence,

citing Pasedach v. Auw, 364 Ill. 491. In the instant case we are satisfied that the findings of the master and the chancellor on the issue of service are against the manifest weight of the evidence.

For the reasons stated the decree of the Circuit Court of Cook County establishing and ordering the foreclosure of a lien against the defendants is reversed and the cause is remanded with directions to dismiss the complaint and the amended complaint for want of equity at plaintiff's costs.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS

KILEY, J., and LEWE, J, CONCUR

337 I.A. 659

44591

AMERICAN ROOF TRUSS COMPANY, a corporation, Plaintiff - Appellee, v. ALBERT C. GOLK and LAURA GOLK, his wife, THOMAS LOURY, doing business as LOURY CONSTRUCTION AND LANDSCAPING COMPANY, THOMAS HOIST COMPANY, a corporation, LIBERTY NATIONAL BANK OF CHICAGO, as Trustee under Document No. 13825998 and "UNKNOWN OWNERS," Defendants, On Appeal of ALBERT C. GOLK and LAURA GOLK, his wife, Defendants - Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

American Roof Truss Company, a corporation, as a subcontractor, filed a complaint and an amended complaint in the Circuit Court of Cook County to declare and foreclose an alleged mechanic's lien against Albert C. Golk and Laura Golk, his wife, the owners, Thomas Loury, the general contractor, and others. Answers and a reply were filed. The cause was referred to a master in chancery, who heard evidence and submitted a report finding that plaintiff has a prior and superior lien and recommending foreclosure thereof. Objections to the report which were overruled by the master were ordered to stand as exceptions. The chancellor entered a decree overruling the exceptions, approving the report and directing the foreclosure of the alleged mechanic's lien. Albert C. Golk and Laura Golk appealed. For convenience we will refer to Mr. and Mrs. Albert C. Golk as defendants.

In its brief plaintiff, under the title of "Additional Facts," states that the agreement under which it did the work is signed by the contractor and the owners. There was no finding by the master or chancellor that plaintiff was other than a subcontractor, and the decree does not find that defendants are obligated to plaintiff by virtue of signing the contract between plaintiff and the contractor. Plaintiff did not except to the master's report or assign cross errors. Hence, it is unnecessary to discuss the effect of defendants' signature on the contract between plaintiff and the general contractor.

The decree found that the final completion date on which plaintiff furnished labor and material in the construction of the roof under its contract with Loury was October 8, 1946, and that on November 29, 1946, plaintiff duly served its notice of subcontractor's lien on Albert C. Golk personally, which constituted good service thereof upon the defendants. Defendants maintain that the findings of the decree (a) that on November 29, 1946 plaintiff duly served its notice of subcontractor's lien on Albert C. Golk personally, and (b) that the final completion date of its contract with the general contractor was October 8, 1946, are against the manifest weight of the evidence. The parties argue these and collateral points. We have carefully read and considered the pleadings, the transcript of the evidence, the exhibits, the master's report, the briefs and the authorities cited. In the view we take of the case it is only necessary to discuss the point advanced by defendants that the finding that they were duly served with notice of a subcontractor's lien on November 29, 1946 is against the manifest weight of the evidence.

Albert C. Golk is in the cartage business with an office at 832 West Fulton Street, Chicago. He and his wife, Laura Golk, as joint tenants, purchased a parcel of real estate at the southwest corner of Fulton and Carpenter Streets, located about a quarter of a mile west of Mr. Golk's office. Defendants employed Thomas A. Loury to erect a garage building on the land and several separate contracts were executed by them for the construction of the building. They entered into a written contract with Loury whereby he agreed to furnish a five truss roof (manufactured by plaintiff) for the building on a cost, plus material and labor basis, plus a percentage supervision charge. It is undisputed that Mr. Golk acted and was the duly authorized agent of his wife in the making of the improvements and that valid service of the lien notice on him as her agent would be binding on her. The parties are in agreement that the law is that a subcontractor's notice must be served personally and that service by mail is insufficient. See Carney v. Tully, 74 Ill. 375, and Agles v. Stolze Lumber Co., 260 Ill. App. 14. It was essential, as a foundation to plaintiff's right to a mechanic's lien, that it prove by a preponderance of the evidence that it served its notice of claim personally. Plaintiff, with offices at 6850 Stony Island Avenue, Chicago, entered into a contract with Loury, the general contractor, to furnish and erect on the building five American Bowstring wood trusses at a price of $5,486. It insists that it served the defendants personally with the subcontractor's lien notice by delivering a copy thereof personally to Mr. Golk for himself and as agent for his wife, on November 29, 1946 at 2:45 p.m. The original lien notice, a

copy of which plaintiff asserts it served on the defendants, is dated November 29, 1946, and states that there was then due to plaintiff the sum of $4,040.

Plaintiff's president is William H. Waddington and the vice president is his son, Raymond J. Waddington. The latter was the only witness to testify for plaintiff on the issue of service of the lien notice. On direct examination he testified that he had seen plaintiff's Exhibit 29 (lien notice) before; that it bore the genuine signature of his father; that on November 29, 1946 he went to see Mr. Golk at the latter's office; that he took with him the original notice of lien and a copy; that when he arrived Mr. Golk was the only one there; that he was very busy; that he was talking on both telephones, which was one of the incidents that helped him to place this particular set of facts in his mind; that while he was talking on the telephone witness waited for him to get through; that it took quite a while; that as soon as one telephone stopped the other would ring again; that when he was through witness handed him a copy of the notice of lien; that witness stepped back and noted the time and date on the back of it; that when he handed Mr. Golk the notice he said to him: "This is a notice of Lien"; that he made a notation on the original of the time he served it, "2:45 p.m. November 29, 1946," which appears in black ink on the back of plaintiff's Exhibit 29; that he made the notation with his own pen immediately after he served the lien; that he previously had occasion to serve notices of subcontractor's lien upon owners of property; that it was his custom to personally serve the notices on the

owners; that Mr. Golk said he was very sorry about everything; that plaintiff did a good job on the trusses; and that he had not paid because he had already overpaid Loury.

On cross-examination Raymond J. Waddington testified that he did not remember where he was on the morning of November 29, 1946; that he didn't recall being in the office on that morning at about 10 or 11 o'clock; that he didn't remember distinctly where he came from on that afternoon to go to Mr. Golk's place of business, but he believed it was from plaintiff's office; that he didn't distinctly remember what time he left the office; that he got plaintiff's Exhibit 29 at the office; that it was made up by the bookkeeper; that he got two of them; that he didn't remember whether they were attached; that his father handed them to him, but he doesn't remember where he was when his father handed them to him; that he was in the office; that he doesn't remember distinctly what day, but thinks it was November 29, 1946; that he doesn't remember the time of day that his father handed them to him, but it might have been in the morning; that he didn't remember the exact time at all; that he doesn't remember whether the exhibit was handed to him on November 29, 1946; that it was a long time ago; that witness read them; that he got two of them; that he got plaintiff's Exhibit 29 and another one and that the other was a duplicate; that he doesn't remember whether the other one was a carbon copy or not; that he looked at them and read both of them, but can't tell now whether a carbon copy or original was given him; that when the two were handed to him he doesn't remember distinctly whether he put them in a file or put them in his pocket; that he went out to Mr. Golk; that he doesn't remember

the exact location at that time, but knew how he got there; that when he got there, Mr. Golk was there; that Mr. Golk, Jr. was not there; that he doesn't remember distinctly whether his father was in town on that day, although he testified a short time previously that his father had handed him the two exhibits; that he didn't remember whether it was the same day, November 29, 1946, but he imagined it was the same day; that he was at Mr. Golk's office on November 29, 1946 about "half an hour, twenty minutes"; that the notation "To Golk, Sr." in pencil on the back of plaintiff's Exhibit 29 is in his father's handwriting; that he doesn't remember whether it was on there at the time he went out to Mr. Golk's place of business on November 29, 1946; that this was true though witness purported to have written in ink down there directly below the notation; that he didn't know whether that pencil notation was on there; that he doesn't remember whether the notation "R.J.W." was on there at the time he went out there; and that he doesn't remember whether he looked on the back of the other copy that he had, so he doesn't know what was on the back of it.

Under cross-examination this witness further testified that when he was in Mr. Golk's office he doesn't remember whether Exhibit 29 was folded or not; that he doesn't remember whether the copy was folded or not, although he looked at it; that the seal in the lower left hand corner is the seal of plaintiff; that he doesn't remember whether the seal was on the other copy; that his father's signature is on the exhibit and was on the other copy; that witness sees the two holes

punched at the top of the exhibit; that he doesn't remember whether the copy had holes punched in it; that witness finally went to a lawyer; that the witness's signature is on the complaint, opposite the notary's seal; that when he went to the attorney he handed him Exhibit 29 some time or other: that the attorney drew up the papers; that witness came in and read over the complaint; that on page 6 thereof witness says that he has read the bill and "the foregoing statements by him subscribed"; that in paragraph 8 of the original complaint where he states "that on the 29th day of October, 1946 the plaintiff delivered to and personally served upon Albert C. Golk and Laura Golk, his wife, the owners of the above described premises, a notice of claim for lien, a true copy of which is attached to the complaint as Exhibit 'B'", witness doesn't remember that although he read the complaint over before he signed it; that he also looked over plaintiff's Exhibit B attached to the complaint; that he looked at the whole thing; and that witness's statement in paragraph 8 of the complaint was bad reading on his part.

To controvert the testimony as to service on the afternoon of November 29, 1946, defendants introduced six witnesses. Albert C. Golk testified that he received defendant's Exhibit 20, purporting to be a notice of sub-contractor's lien, in the mail around December 6th or 7th, 1946; that he received it about a week after Thanksgiving; that it was never handed to him personally; and that he was not at his place of business on the afternoon of November 29, 1946. Thanksgiving Day was observed on Thursday, November 28, 1946. Witness states that he was at his place of business Friday, November 29, 1946, until about 11:45 a.m.

that it was the day after Thanksgiving; that it not a busy day in his business; because hauling by carlots is all over before Thanksgiving and that Friday and Saturday are particularly quiet; that he received a call that morning from Herman Bollmann, a friend of his; that Bollmann called to make an appointment; that Bollmann said, "I will see you out at Jake's"; that witness left the office at 11:45 a.m.; that he drove to North Avenue and Ridgeland to Jacob Loibl's tavern; that he arrived at the tavern he "imagined" between a quarter after and half past twelve; that when he arrived Mr. Bollmann was sitting there at the bar talking to Jake; that they remained at the tavern until around three o'clock; that they then went to Franklin Park to the DeLuxe Gardens; that they remained there just a few minutes; that they then went to the Chi-Oak Inn at Chicago and Oakley, where they remained until a little after 5:00 p.m.; that at 5:00 p.m. witness went home and Bollmann went to pick up his girl friend; and that witness did not go back to the office that day. Mr. Golk was cross-examined. We are not detailing the cross-examination as we have concluded that it did not shake his testimony in chief. There was no attempt to cross-examine the witness as to his movements on November 29, 1946 after he left his office and went out to Jacob Loibl's tavern, nor was there any attempt to impeach the witness.

Mr. Golk's testimony as to his movements on Friday, November 29, 1946 is corroborated by H. C. Bollmann. He is employed at the Mack Truck plant as a pick-up driver and had been so employed for five years at the time he testified. He recalled the weekend of Thanksgiving, 1946. He did not

work on November 29th or 30th. Ordinarily, he worked on Fridays and Saturdays at that time. He knew Mr. Golk 30 or 35 years. Mr. Bollmann testified that he was at the tavern about 12:15 noon on November 29th; that Golk came in about 10 or 15 minutes thereafter; that he called Golk earlier in the day to make the appointment; that he had called him from a drugstore at Division and Austin Boulevard; and that they left the tavern a little after 3:00 p.m. He supported Golk's testimony as to their movements on that afternoon and said that they left the Chi-Oak Inn at about 5:00 p.m. This witness was not cross-examined and no attempt was made to impeach him.

The testimony of Golk and Bollmann was corroborated by that of Jacob Loibl and Albert C. Golk, Jr. The latter testified that on November 29, 1946, the day after Thanksgiving, he was down at work; that in the morning he did the same as always; that his duties were directly outside of the office; that he went into the office on that day between 11:15 and 11:30 a.m.; that his father washed up and left the office somewhere between 11:30 and 12 o'clock; that witness spent the rest of the day in the office; that he was in the office all the time until 6:30 or 7:00 p.m. that night; that his father did not come back to the office that day; that witness did not see Mr. Waddington that day at all; that Mr. Waddington did not hand him any notice of lien or anything; that he did not hand his father any notice of lien at 2:45 p.m. that day; and that he next saw his father on Saturday morning. Witness further testified that on November 29, 1946 his wife worked in the morning; that that afternoon she was a passenger on an airplane to

St Louis; that this is the way witness fixed the date; and that she came back from St Louis on Sunday, December 1st, at about 1:30 p.m. Albert C. Golk, Jr. further testified that he went out to plaintiff's office on December 5th or 6th; that he had never been out there before; that he has not been there since; that the first time he ever saw defendant's Exhibit 20, a copy of a notice of lien, was about a week after he was at plaintiff's office; that witness had come in from the outside; and that witness came into the office and his father showed it to him. This witness was not cross-examined upon any of the foregoing testimony, nor was any attempt made to impeach him. Leona Golk, his wife, testified that on the afternoon of November 29, 1946 she and Mrs. Lillian Chapman went to the Municipal Airport and that they went by airplane to St Louis. Defendants introduced their Exhibit 28, her airplane ticket. She came back via the air line the following Sunday, December 1st. She was not cross-examined, nor was any attempt made to impeach her. Mrs. Lillian Chapman testified that she accompanied Mrs. Golk on the airplane journey to St Louis, but that she returned a few days later.

There is no testimony in the record to corroborate Raymond J. Waddington's story. He testified that he doesn't distinctly remember what day, but thinks it was November 29, 1946, when his father handed the notice of lien and copy to him. The father failed to corroborate this testimony. The father testified that Albert C. Golk, Jr. and Thomas Loury were out to plaintiff's office on November 29, 1946, which was the same day Raymond J. Waddington testified he served the notice of claim for lien. On cross-examination the

father testified that he didn't know what his son did on November 29, 1946, and that he didn't know that his son was in town that day. Raymond J. Waddington testified that plaintiff's Exhibit 29 was made up at plaintiff's office on November 29, 1946 by a bookkeeper, but plaintiff failed to produce the bookkeeper to corroborate this story. We agree with defendants that none of their witnesses was impeached or discredited. Three of them, Herman Bollmann, Jacob Loibl and Lillian Chapman were disinterested and were not even cross-examined. Albert C. Golk's movements on November 29, 1946 are accounted for. The fact that Golk was in the business of hauling meat and that by Thanksgiving all of the hauling would be done so that Friday and Saturday thereafter would be particularly quiet, would make it natural and probable that he would take the afternoon off to relax and visit with his friend. Bollmann also had Friday and Saturday off at this time. The fact that he was off from work on this particular Friday and Saturday would be consistent with the fact that it was the Friday and Saturday after Thanksgiving. Mr. William H. Waddington, after testifying about a conversation at plaintiff's office on the morning of November 29, 1946 wherein Mr. Golk, Jr. was present, stated that in a deposition for discovery taken on April 28, 1947, in answer to the question as to whether he recalled the date of the conversation, he answered, "Yes, it could be in December or November; I don't recall." In answer to the further question "Was that in the early part of December, 1946?" and whether he answered, "I don't remember the date A. C. Golk was at my office," he replied: "I don't remember,"

Mr. Albert Golk, Jr. denied that he was at plaintiff's office on November 29, 1946. We find that the evidence, exhibits and surrounding circumstances support defendant's position that Mr. Albert Golk, Jr. was not at a conference at plaintiff's office on the morning of November 29, 1946. The documents introduced by plaintiff and the so-called surrounding facts do not support plaintiff's allegation of service of lien and do not overcome the unimpeached testimony establishing that Mr. Golk, Sr. was not at his office the afternoon on which plaintiff claims he served him personally.

In Larson v. Glos, 235 Ill. 584, the court said (588):

> "A master has some advantage in being able to see and hear the witnesses, where he, in fact, does so; but he may have considered incompetent evidence or failed to consider competent evidence, and, in any event, his findings are only prima facie correct. It is only where the court has heard the evidence and decided the case that we have refused to disturb the finding unless it was clearly and manifestly against the weight of the evidence. This court has never adopted the rule that a master's report is to be given the same effect as the verdict of a jury in a case where the parties have a right to have issues of fact determined by jury. Fairbury Agricultural Board v. Holly, 169 Ill. 9; Ennesser v. Hudek, id. 494."

In Borovansky v. Para, 306 Ill. App. 60, we said that the master in chancery saw the witnesses and heard them testify; that it was his province to determine the facts; that while his findings do not carry the same weight as the verdict of a jury, or of a chancellor, where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause; and that where his conclusions as to the facts have been approved by the chancellor, we are not justified in disturbing his findings unless they are against the manifest weight of the evidence,

citing Pasedach v. Auw, 364 Ill. 491. In the instant case we are satisfied that the findings of the master and the chancellor on the issue of service are against the manifest weight of the evidence.

For the reasons stated the decree of the Circuit Court of Cook County establishing and ordering the foreclosure of a lien against the defendants is reversed and the cause is remanded with directions to dismiss the complaint and the amended complaint for want of equity at plaintiff's costs.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS

KILEY, J., and LEWE, J, CONCUR

44671

JOHN C. KARNATZ, Appellant, v. HENRY A. KARNATZ, MINNIE C. FICK, ANNA KRUEGER, HELENE FICK, MARGARET KUTZ, WALTER A. KARNATZ, ALVINA K. POEHLER, ESTHER E. FRITZ, FRED A. KARNATZ, LAURITZ P. HWASS, SAM TAVALIN and EMIL FICK, Defendants, SAM TAVALIN, Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On April 6, 1944, Henry Karnatz and Amelia Karnatz, his wife, the parents of John C. Karnatz, Henry A. Karnatz, Minnie C. Fick, Anna Krueger, Helene Fick, Margaret Kutz, Walter A. Karnatz, Alvina K. Poehler, Esther E. Fritz and Fred A. Karnatz, conveyed to two of their children, namely, Henry A. Karnatz and Minnie C. Fick, as trustees, 390 vacant lots with a frontage of 12,080 feet, scattered over 17 blocks in Lincolnwood, Cook County, Illinois. Concurrently therewith the grantees made a written declaration of trust stating that they would hold the realty for the ultimate use and benefit of themselves and their 8 brothers and sisters, each of whom became the beneficial owner of a 1/10th interest in the subject matter of the trust. The declaration of trust was in the usual language and contained, among other things, a provision that while the trustees are the sole owners of the real estate so far as the public is concerned, it is understood that they "will deal with it only when authorized to do so, and that they will, on the direction of any seven of the * * * beneficiaries * * * make deeds

for, or otherwise deal with the title to said real estate * * *." This instrument was signed by Henry A. Karnatz and Minnie C. Fick, as trustees, and by all the beneficiaries, except John C. Karnatz.

After the trustees acquired title to the realty they sought a purchaser therefor. The trustees and beneficiaries met from time to time to discuss the terms of sale. Eventually, a deal to acquire the property was consummated, pursuant to a written offer dated March 3, 1945, addressed by Sam Tavalin to the trustees. In the drafting of the trust instrument and in the transaction with Mr. Tavalin, Mr. Lauritz P. Hwass was attorney for the trustees. The offer from Tavalin, in the form of a letter, recites that Hwass represented to him that he, Hwass, "can settle all special assessments and general taxes, including 1944, for the sum of $105,000, on the above described premises, including his attorney's fees, Chicago Title and Trust Company charges for covering tax foreclosure proceedings and the issuance of a Guarantee Policy in the amount of $195,000, court costs, etc. On that basis I offer you for a deed clear of all encumbrances except taxes and special assessments, current and delinquent, the sum of $90,000.00 upon the following conditions: (1) I will deposit in escrow $5,000.00 as earnest money with the Chicago Title and Trust Company within five (5) days after the acceptance of this offer. (2) Mr. Hwass is to cause to be instituted general tax foreclosure and special assessment foreclosure proceedings, follow the same through to decrees of sale, sales thereunder, and confirmation as expeditiously as possible. I will

supply the funds necessary to bid at any tax or special assessment foreclosure sale and will purchase in the name of our nominee, provided said bid shall be within the contemplated figure included within the $105,000.00 aforesaid. In the disbursement of said $105,000.00, I am to accept the directions of your attorney, Lauritz P. Hwass, including the payment of any unexpended balance to him as fees or other expenses, there being no obligation upon my part to deliver to you any such unexpended balance, the intent being that you are to receive for the above lots only the sum of $90,000.00 as aforesaid.
(3) When and if a confirmed sale shall be had on the above described premises at a figure which with attorney's fees and other expenses, court costs, Chicago Title and Trust Company charges, etc., shall not require the disbursement of more than the total of $105,000.00 as aforesaid, I will accept from you a deed conveying the above premises to our nominee and will pay to you $15,000.00 together with the $5,000.00 earnest money, and cause our nominee to execute a note of $70,000.00, or if you prefer ten notes of $7,000.00 each, payable on or before five years after their date without interest and secure the said notes by a first mortgage trust deed conveying the above described premises, delivering you a mortgage policy with all reference to general taxes, including 1944, and all special assessments, current and delinquent, removed from said policy, said trust deed to contain a provision permitting of the release of any of the above lots in blocks or parcels of not less than 450 feet frontage upon the payment of $10.00 per front foot," except that certain lots may be released individually upon the payment of $10.00 per front foot.

Continuing, the offer states:

"4. Paragraph 3 of this offer provides that I am to pay in cash the sum of $15,000.00, in addition to the $5,000.00 earnest money therein provided for. In view of the fact that some of the lots are now encumbered by a Trust Deed dated November 20, 1943, and recorded as Document Number 13184078, upon which there is an unpaid balance of approximately $14,000.00, I reserve the right and privilege to accept the title to the real estate involved, subject to said mortgage and to take credit for the balance due thereon against the $15,000.00 cash requirement. In the event I exercise the aforementioned privilege, the $70,000.00 purchase money mortgage will, of necessity, be a secondary lien on those lots covered by the Trust Deed document Number 13184078. * * *

"8. The escrow deposit is to be returned in the event Bills to Foreclose the special assessments and general taxes shall not be filed within the period of 90 days after the date of the escrow deposit, as aforesaid, and all liability either on your part or on the part of the undersigned shall cease and determine. In the event such a Bill, or Bills, shall be filed and decrees of foreclosure and sales shall not be had in an amount which with the other expenses, fees, etc. as aforesaid shall be within the figure of $105,000.00 as aforesaid, the $5,000.00 is to be returned and all liability under this agreement shall cease and determine. * * *

"10. So that you may be in touch with the conduct of such foreclosure proceedings, the undersigned agrees that Lauritz P. Hwass, your attorney, shall handle the tax and special assessment foreclosure proceedings to a conclusion. His fees, costs and expenses for the handling of such foreclosure proceedings are to be paid only out of and are included within the $105,000.00 as aforesaid. We are to arrange with him as to the manner of the payment of his fees either in cash or out of the proceeds of the resale of the real estate, as he and the undersigned shall agree, but in any event you are not to be held responsible for any such fee and expenses.

"11. Should the offeror default in the performance of this contract on his part at the time and in the manner specified, for reasons beyond his control, then, the earnest money shall be forfeited as liquidated damages, and this contract thereupon shall become null and void.

"12. This offer is to be accepted by you on or before five (5) days after the date hereof, otherwise to be null and void, written notice of such acceptance to be given to the undersigned within such period."

On the day the offer was made, March 3, 1945, eight of the beneficiaries addressed the following letter to the trustees authorizing the acceptance of the offer:

"We have read the attached offer, understand it and it is entirely satisfactory. You are authorized to accept said offer, and when, as and if payments shall be made under said Contract of Purchase or payment shall be made on account of the principal amount due under the Mortgage, to pay Lauritz P. Hwass for his compensation in connection with said offer the sum of five per cent (5%) of the principal amount of $90,000.00, said payments, however, to be made only out of collections received account of purchase price and paid to him pro rata. We understand he is to receive compensation from the purchaser for his services in negotiating settlement of taxes and special assessments and concluding tax and special assessment foreclosures."

John C. Karnatz and Margaret Kutz are the two beneficiaries who did not join in the authorization. On the same day the trustees accepted the offer in a letter reading:

"You are hereby advised that your offer to purchase the Pratt-Cicero Subdivision for $90,000.00 subject to taxes and assessments under the conditions outlined in said offer, copy being hereto attached, is accepted, and you are directed to arrange with our Attorney, Lauritz P. Hwass, for the deposit of the earnest money provided in said offer and thereafter cooperate with him in completing the purchase. This acceptance is made pursuant to the directions which the undersigned have received from the beneficiaries in the Trust."

The sale was completed by conveying the title to the land to Betty Flower, a nominee of Tavalin, on or about June 29, 1945, pursuant to his offer and the acceptance by the trustees. A Guarantee Policy for $195,000.00 was delivered as required by the offer.

In the fall of 1945 John C. Karnatz learned from one of the trustees that the real estate had been sold to Tavalin. In January, 1947, John C. Karnatz employed an attorney, who, on January 10, 1947, addressed the following letter to each of the trustees:

"I have been retained by your brother, John C. Karnatz, and your sister, Margaret Kutz, to represent them in connection with their interest in certain real estate and other property conveyed or caused to be conveyed and

transferred by your father, to you and Minnie C. Fick, as trustees, for the benefit of the ten children of your father. I have learned from various sources that you and your co-trustee have disposed of some of said property. My clients assert that such disposition was made by said trustees without their consent. Furthermore, my clients advise me that, although they have on numerous occasions asked you and your co-trustee for an accounting of your acts and doings with respect to the trust property, yet you have failed, neglected and refused to comply with their request. Please consider this letter as a formal demand that you transmit to me within a reasonable time from the date of the receipt of this letter by you, a report and an accounting in your capacity as trustee aforesaid. A letter of similar import is being dispatched by me on this date to your co-trustee."

On January 14, 1947 Mr. Hwass telephoned John C. Karnatz that he was preparing a report for the trustees and that the same would be received the following day. On January 15, 1947, the attorney for John C. Karnatz received from Mr. Hwass a letter purporting to give a history of the transaction. At the request of this attorney, Mr. Hwass gave him further information about the transaction. On March 12, 1947 Mr. Hwass made a complete itemized report to the trustees, a copy of which they delivered to the attorney for John C. Karnatz.

On April 24, 1947, John C. Karnatz, for his own use and for the use of the other beneficiaries under the trust, filed a complaint in chancery in the Superior Court of Cook County against Henry A. Karnatz and Minnie C. Fick, the trustees, and prayed for discovery, an accounting, judgment for damages suffered as a result of the failure and omission of defendants to sell the real estate for not less than $110,000.00, judgment for damages sustained as the result of the defendants' breach of trust, for the removal of the trustees, the appointment of other suitable persons in their stead, and for other relief. On October 3, 1947, by leave of court, plaintiff filed an amendment to the complaint by

making all of the other beneficiaries of the trust parties defendant. On October 16, 1947, Henry A. Karnatz and Minnie C. Fick filed an answer to the complaint, as amended. On February 26, 1948, leave of court was granted to plaintiff to implead Lauritz P. Hwass, Sam Tavalin and Emil Fick as additional parties defendant, and to file his supplemental complaint. The supplemental complaint was filed. Among other things, it prayed that Sam Tavalin be decreed to pay plaintiff for the use and benefit of the trust the sum of $10,000.00. On April 2, 1948, Sam Tavalin filed his motion to strike and dismiss the supplemental complaint for want of equity. On April 30, 1948, pursuant to leave granted, plaintiff filed an amendment to his supplemental complaint. On May 10, 1948, Tavalin filed a motion to strike and dismiss the complaint, supplemental complaint and the amendment thereto, for want of equity. By stipulation it was ordered that the copy of the offer dated March 3, 1945 from Tavalin, attached to the answer of Henry A. Karnatz and Minnie C. Fick, be considered as a part of the complaint. On June 8, 1948 the court sustained the motion of Sam Tavalin and entered a decree that the complaint, as supplemented and amended, be dismissed for want of equity as to Tavalin. Plaintiff, appealing, asks that the decree be reversed and that the cause be remanded with directions to overrule Tavalin's motion, and for such other proceedings as the court shall deem meet.

In the statement of March 12, 1947 from Hwass to the trustees, a copy of which they sent to the attorney for plaintiff, in setting out the disposition of the $105,000.00 mentioned in the offer of March 3, 1945, the following is stated as the reason for the reduction of the estimated fees, costs and expenses, from $25,000.00:

"To obtain cash from Tavalin, reduction of estimated fees, costs and expenses of $25,000.00 . . . . . Explanation of reduction: As you will remember, we had to guarantee to Tavalin that the figure of $105,000 and the figure of $90,000 due you be firm. Tavalin agreed that he would pay the $25,000 on or before one year after date of delivery of the policy, which would have meant approximately $19,000 to us after reimbursing ourselves for our cash expenditures of over $6,000. He had the option, however, of not paying the $25,000 but in lieu thereof to give us an agreement that after he had obtained complete reimbursement of all of his money, we were then to get $25,000 plus an interest in the net profits. This conceivably would drag a great number of years and might result in our not getting any funds out of the deal, as his expenditures for improvements, subdivision expenses, etc. might eat up all profits. After all he controlled the figures and could do whatever he wanted to do without any supervision from us. We accordingly agreed to reduce the figure of $25,000 to $15,000 and he paid to the D'Anza Estate $7,500.00 and to me $7,500.00; after reimbursing ourselves for expenditures, this left us a fee of $8,859.56 divided between us."

Mr. D'Anza, an attorney now deceased, was associated with Mr. Hwass in conducting the tax foreclosure proceedings, as he was a specialist in that field.

In his reply brief plaintiff states that the document set out on pages 7 and 8 of the supplemental abstract, being the authorization by 8 of the 10 beneficiaries to the trustees to accept the offer of Tavalin, and the acknowledgment therein that such beneficiaries understood that in addition to the commission which Hwass was to receive from the $90,000.00 he was also to receive compensation from the purchaser for his services in negotiating the settlement of taxes and special assessments and concluding taxes and special assessment foreclosures, does not belong there; that it is no part of the case; that it is a part of the defensive pleading filed by the trustees; that plaintiff did not adopt all of the trustees' answer, and that if Tavalin

desired to seek comfort in that exhibit he should have filed an answer and pleaded it in support of his defense; that plaintiff never signed it; that he has always disavowed it; that as a matter of fact, in the light of the revelations concerning the question of their attorney's disloyalty, the signers thereof have a right to disavow it; and that there is no more reason for considering that exhibit in this appeal than there would be to give consideration to the entire answer of the trustees. Paragraph 12 of the complaint recites a letter from attorney Hwass dated January 24, 1947, transmitting to the attorney for plaintiff a photostatic copy of the offer of Tavalin, the direction by the 8 beneficiaries to the trustees to accept the offer, and the direction to the trustees by 8 of the beneficiaries to convey the title to Betty Flower. Paragraph 15 recites the acceptance by the trustees dated March 3, 1945, the concluding sentence of which states that such acceptance is made pursuant to the directions which the trustees "have received from the beneficiaries in the trust." The amendment to the supplemental complaint filed April 30, 1948, alleges that the "offer of March 3, 1945 was accepted by the trustees and some of the beneficiaries in reliance upon the implied representations of Hwass and Tavalin that the same was in all respects regular and proper, and that no secret profit was contemplated for their attorney." In view of the fact that the acceptance by the trustees and the authorization by 8 of the beneficiaries was set up in the answer which had been filed prior to the supplemental complaint, it is manifest that plaintiff was referring to the authorization and acceptance pleaded in the answer of the trustees. In this state of the record we cannot agree with plaintiff's position that we should not consider the document dated March 3, 1945, signed by 8 of the beneficiaries.

Plaintiff maintains that his complaints properly allege that he at all times insisted that the property not be sold for less than $10.00 in cash per front foot; that he consistently refused to accede to a sale on any other terms and so indicated to the trustees in a vigorous and forceful manner; that the trustees in turn, by their conduct and demeanor, led plaintiff to believe that his wishes would be complied with; that at the last meeting of the trustees and beneficiaries which plaintiff attended, the figure of $110,000.00 net cash was mentioned and seemingly met with the approval of the majority of beneficiaries; that although plaintiff did not expressly consent to the sale at such figure, he assumed that the sale to Tavalin (whose identity he learned later) was made upon such terms; that in the fall of 1945 plaintiff learned from one of the trustees that the real estate had been sold to Tavalin, but that the trustee declined to give him any further information concerning the sale, or the terms and conditions thereof; that Tavalin understood that the purchase price was $195,000.00 and that $105,000.00 was to be used for removal of the tax lien; that both Tavalin and Hwass construed the transaction to be one involving the sale of the property for $195,000.00, of which $105,000.00 as part of the purchase price was to be credited to Tavalin as said sum was disbursed; that prior to March 3, 1945 Hwass had caused to be made an analysis of the taxes and assessments against the property; that as a result thereof, as well as from inquiries made by him in his capacity as attorney for the

trustees, Hwass learned that the approximate amount necessary to clear such tax charges was $80,000.00; that Hwass never disclosed this information to his clients, the trustees and beneficiaries; that he did, however, give this information to Tavalin in the course of their negotiations prior to March 3, 1945; that in the course of such negotiations and conversations Tavalin and Hwass formulated the plan for the acquisition by Tavalin of the property; that pursuant to the plan they suppressed the fact of the sufficiency of $80,000.00 for the purposes aforesaid; that Tavalin and Hwass knowingly withheld from the trustees and beneficiaries the fact that out of the sum of $105,000.00 mentioned in the offer, $25,000.00 (less the fee of A. H. D'Anza, engaged by Hwass to assist him) had been allocated by Tavalin and Hwass as the secret profit of Hwass; that Tavalin and Hwass well knew that the trustees and beneficiaries were ignorant of such allocation, and by their conduct and demeanor led the trustees and some of the beneficiaries to believe that the sale contemplated by the offer of March 3, 1945 was actuated by good faith on the part of all the parties concerned and was free from any secret schemes; and that Tavalin knowingly aided and assisted Hwass in keeping the facts from the trustees and beneficiaries.

The complaints allege further that in consequence of the conduct of Tavalin and Hwass the trustees were induced to believe that the offer was fair, equitable and in all respects honest; that the offer was accepted by the trustees by an instrument dated March 3, 1945; that such acceptance was made in reliance upon the implied representation of Tavalin and

Hwass that no secret profit was contemplated by Hwass; that although the acceptance recites that it is made pursuant to the directions the trustees received from the beneficiaries, plaintiff at no time gave such direction, the offer was never shown to him, and he was not advised of the contents thereof; that in addition to setting aside $25,000.00 out of the $105,000.00 for the benefit of Hwass, Tavalin also provided Hwass with an opportunity to share in the profits from the venture; that this side deal was entered into between Tavalin and Hwass on or about March 3, 1945, but was first disclosed to the trustees after the filing of the instant suit; that Hwass never mentioned to the trustees the $25,000.00 fee, nor the $80,000.00 allocation to clear taxes; that on March 27, 1945 this undisclosed collateral agreement was reduced to writing; that the existence of the agreement was not revealed to the trustees or beneficiaries before the sale was consummated; that it came to light on May 26, 1947, when the deposition of Hwass was taken; that the effect of the side deal between Tavalin and Hwass was to create an interest to the advantage of Hwass adverse to that of the trust he was representing; that it deterred Hwass from the duty of exercising the utmost good faith, honesty, integrity, fairness and fidelity in the representation of the interests of the trustees; that as a result of the antagonistic position he was occupying, Hwass compromised the interests of the trust; that some time after March 27, 1945 Hwass excused Tavalin from the obligation to pay $10,000.00 of the $25,000.00 set aside by Tavalin as the fee of Hwass (out of the $105,000.00); that pursuant to the

release Tavalin has not paid the sum of $10,000.00; that the action of Hwass in relieving Tavalin of his obligation to pay $10,000.00 of the $105,000.00 was without any authorization from the trustees; and that plaintiff, for the benefit of the trust, is entitled to have a judgment against both Hwass and Tavalin for the sum of $10,000.00.

The letter from Hwass to Tavalin dated March 27, 1945, calls attention to the terms of the offer of March 3, 1945. Hwass states that in order to clarify arrangements with Tavalin regarding the payment of his fees out of the $105,000.00 set forth in the offer, Tavalin was advised that Hwass' understanding as to the payment of his compensation was as follows:

"1. You are to make available to me the sum of $80,000 to be used for the payment of any and all general tax and special assessment liens now existing against the premises, from which all foreclosure bids, foreclosure costs, auditor's fees, miscellaneous expenses, Chicago Title and Trust Company Guarantee Policy charges for a $195,000 Owners' Policy, as well as any and all other items of cost necessary to deliver good title under this deal, and special tax items in connection with foreclosure proceedings will be paid, with no obligation on my part to make any accounting to you as to the details or breakdown of the disbursement of said $80,000; except, that you shall first be satisfied that upon the payment and delivery to me of said $80,000, the Chicago Title and Trust Company will waive any and all objections with reference to all general tax and special assessment liens on the property involved for all years down to and including the year 1944, as well as any and all questions of title after showing same in your name or in the name of your nominee. 2. The balance of the $105,000 required to be paid to me under your offer, amounting to $25,000, is to constitute my fee in connection with the tax work on this property, whether rendered by me or by my associate, and is to be paid to me on or before one year after the deal has been consummated in every respect, the special assessment and general tax foreclosure proceedings have been completed, and the Chicago Title and Trust Company has issued its Guarantee Title Policy to you in the sum of $195,000. The undersigned hereby grants you the exclusive privilege and option of paying said sum of $25,000 to me in cash, on or before one year

after the date that the Chicago Title and Trust Company Owners' Guarantee Title Policy is delivered to you, or in lieu thereof, to postpone such payment under the following terms and conditions, to wit: 1. If said $25,000 is paid to me within one year from the date a Chicago Title and Trust Company Owners' Title Policy is delivered to you, I shall have no further interest of any kind in the property above referred to or any of the income or avails thereof. 2. If said $25,000 is not paid to me within one year from the date a Chicago Title and Trust Company Owners' Guarantee Title Policy is delivered to you, said amount shall become due and payable after you have been repaid from the proceeds of sale of said property an amount equal to $85,000 (being earnest money $5,000 and $80,000 aforesaid), plus all expenditures made by you for improvements to the property, sales and organization expenses, auditing and attorneys' fees, real estate commissions, overhead expenses, plus all expenses deemed necessary by you to promote the sale of the lots comprising said property and after the existing mortgage of approximately $15,000 and the purchase money mortgage of $70,000 have been paid. As soon as you have made such full recovery, you shall then use all surplus funds available therefor to pay off and retire the $15,000 mortgage on a portion of the property and the $70,000 purchase money mortgage, and then you will pay said $25,000 to me in cash and in addition thereto give me at that time an undivided one-eighth (1/8) interest in and to all of the profits from the sale of the property involved herein. 3. At the time of the disbursement of said $80,000, it is contemplated that a deed from said trustees will be given to you, conveying the title to your nominee and thereafter title will be conveyed by said nominee to a trust or to a corporation; so that I may receive proper assurance that my fees of $25,000 and the one-eighth interest, as aforesaid, will be recognized and protected, I am to receive at that time a ratification of the agreement by said trust or incorporation to which title is conveyed."

Betty Flower, Sam Tavalin and A. H. D'Anza accepted the above agreement.

Plaintiff maintains that Tavalin is liable to him, for the benefit of the trust, for all damages sustained by the trust by reason of Tavalin's fraudulent participation with the trustees or their attorney in acts or omissions detrimental to the trust; that plaintiff had a right that Tavalin should not participate in any breach of trust; that Tavalin was luring Hwass in order to assure for himself the acquisition of an extremely valuable tract of land on terms most favorable to him; that Tavalin concealed from the

trustees and the beneficiaries that he and Hwass had, by agreement between them, set aside a $25,000.00 fee for Hwass out of the $105,000.00 remaining after the $90,000.00 allocation to the trustees; that this allocation in itself was deceptive, for actually the trustees were to realize only $75,800.00 the difference between $90,000.00 and the first mortgage of $14,200.00, which the buyer was assuming; that Tavalin also contrived to prevent the trustees and beneficiaries from learning that their lawyer stood to receive a one-eighth interest in the profits of the venture, which information would undoubtedly have changed the gullibility of the trustees and beneficiaries into suspicion; that by inserting in the offer a provision that Hwass' fees and the expenses for the foreclosure would be included within the $105,000.00, Tavalin misled the sellers into believing that their attorney would be paid only a fair and reasonable fee for clearing the taxes; that Tavalin is precluded from deriving any benefits out of his transactions with Hwass; that Tavalin, who knew that Hwass transcended his authority, is answerable to the sellers for all damages sustained in consequence of such wrong and transgression; and that the waiver and release by Hwass to Tavalin of the $10,000.00 was without consideration to the trust.

As the case, so far as Tavalin is concerned, was decided on the pleadings, it is well to bear in mind certain elementary rules. Motions to dismiss or to strike admit facts well pleaded, but not conclusions of law or conclusions of fact unsupported by allegations of specific facts upon

which such conclusions rest. Allegations with regard to exhibits are controlled by the exhibits attached to the pleadings. Facts and circumstances which constitute alleged fraud, collusion or conspiracy should be set out clearly and with sufficient particularity to apprize the opposite party of what he is called upon to answer. It is alleged that Tavalin suppressed the facts with regard to the taxes. The act of commission or omission by which this result was brought about is not charged. Tavalin had a right to presume that Hwass, as attorney for the trustees, would act properly toward his clients. It is also charged that Tavalin knowingly withheld information. The complaints do not set out when and where he was asked to supply information. It is charged that Tavalin aided and assisted in keeping facts from the trustees and beneficiaries, but no overt act is alleged to justify this conclusion.

The documents show clearly that the offer was accepted and the trustees were authorized to carry out the deal by more than the requisite number of beneficiaries. The best evidence of the so-called "side deal" is the document stating its terms. Tavalin does not know what Hwass told his clients. There are no allegations in the pleadings as to any specific communications of Tavalin with anybody except in writing. Tavalin was not obligated to pay anyone connected with the deal any more than he paid. The offer, the acceptance and the consent of the beneficiaries show that Tavalin promised to pay to the trustees $90,000.00 in the manner set forth in the offer, and there is no allegation that this obligation has not been met, As a condition to Tavalin's obligation to pay the $90,000.00, the taxes and specials had to be settled within the figure of an additional $105,000.00. Tavalin agreed to pay up to that amount, but not to pay that amount in all events. Within

that amount not only the money required to discharge the generals and specials was to be found, but also expenses and attorneys' fees. The attorneys' fees for Hwass and D'Anza were to be paid as set forth in the agreement. Under that agreement Tavalin had the option to pay $25,000.00 one year after closing or to postpone the payment until the Lincolnwood development observed a profit, when $25,000.00 was to be paid out of the profit, plus one-eighth of the remaining profit. Hwass and D'Anza (or the latter's estate) on the one side, and Tavalin on the other, compromised that option by Tavalin paying the $15,000.00 in cash. We agree with Tavalin that plaintiff had no interest in that settlement. There are no sufficient allegations that Tavalin participated in any breach of trust. Tavalin was a purchaser of real estate from the trustees who were represented by a member in good standing of the bar of Illinois. He agreed to pay $90,000.00 for the property and there is no allegation that this amount has not been paid in accordance with the terms of the offer. The trustees and beneficiaries were fully informed that up to $105,000.00 might be spent in the process of removing the lien of general taxes and special assessments. It is alleged that Hwass did not inform his principals of the breakdown of the $105,000.00 between fees and other expenditures. There is no allegation that Tavalin was ever asked about this breakdown and no allegation that Hwass informed him that he, Hwass, had not fully informed Hwass' principals. So far as the trustees and the beneficiaries are concerned, the deal was for $90,000.00. While the parties contemplated that an Owners' Guarantee Policy for $195,000.00 would be issued, it is clear that the sellers were to receive only $90,000.00, (less the amount of the first mortgage), out of which they were to pay a commission to Hwass.

The offer of March 3, 1945 clearly states that the sellers are to receive only the sum of $90,000.00, and that there is no obligation on the part of Tavalin to deliver to the sellers any part of the unexpended balance from the $105,000.00 set aside for the purpose of clearing the property of taxes, special assessments and paying all the expenses incident thereto, including attorneys' fees. The authorization to the trustees from 8 of the beneficiaries to accept the offer recites that they understood that Hwass was to receive compensation from the purchaser for his services in negotiating settlement of taxes, special assessments and concluding tax and special assessment foreclosures. Under the trust instrument the trustees were authorized to act on the direction of 7 of the beneficiaries. While it was their duty to consult with all of the beneficiaries, a third party, such as Tavalin, was fully justified in relying upon the authorization by the 8 beneficiaries. The sale, so far as the beneficiaries and trustees were concerned, was for $90,000.00. We cannot discover in the complaints any properly pleaded allegations charging Tavalin with fraud or conspiracy. Tavalin never agreed unconditionally to pay the sum of $105,000.00 to discharge the lien of the general taxes and special assessments. He agreed to pay only such part thereof as was necessary to accomplish this result, nor did Tavalin unconditionally promise to pay $25,000.00 as attorneys' fees. The agreement to pay $25,000.00 as fees was contingent upon future events. He compromised this contingency. Plaintiff has no just ground to complain about this compromise so far as Tavalin is concerned.

We are satisfied that the chancellor was right in sustaining the motion of Sam Tavalin to strike the complaint as supplemented and amended and in dismissing it for want of equity. Therefore, the decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

KILEY AND LEWE, JJ. CONCUR.

337 I.A. 661

44456

PEOPLE OF THE STATE OF ILLINOIS, ex rel. NORINE BERGQUIST, INEZ CHAMPION, KATHRYN BURKE, JULE DOYLE, MARY LAMSON, ANNA FLANAGAN, and MARY A. PARKER, Appellees,	
v.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
WALTER L. GREGORY, and JAMES B. CASHIN, Civil Service Commissioners of the City of Chicago; JOHN C. PRENDERGAST, Commissioner of Police of the City of Chicago; JOSEPH T. BARAN, Treasurer of the City of Chicago; and ROBERT B. UPHAM, Comptroller of the City of Chicago, Appellants.	

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a mandamus action to compel defendants to reinstate plaintiffs as Civil Service Policewomen in the Police Department of Chicago. The writ was issued to compel their reinstatement in the classified service, their re-assignmemt to duty and their restoration to the City payroll. Defendants have appealed.

There are thirteen plaintiffs. All but Norine Bergquist had served as policewomen under temporary appointments beginning at various dates since 1934. They took the Civil Service examination for the position of policewoman September 9, 1946. The list of the successful candidates was posted December 4, 1946. The names of all the plaintiffs were on the list. They were certified by the Civil Service Commission to the Police Commissioner December 16, 1946. On that date they were appointed policewomen and began their six months' probationary service. February 21, 1947, they were discharged. Their demands

for reinstatement were denied and this suit followed.

The question whether plaintiffs were entitled to the writ involves a determination of the regularity and legality of the actions of the Commission after certification. It also involves the propriety of their discharge after certification for falsification of their ages in an application prerequisite to the Civil Service Examination.

Defendants made a motion to strike the complaint. The motion was denied and defendants answered. Subsequently, evidence was presented by both parties. The question of the sufficiency of the complaint was accordingly waived. Cottrell v. Gerson, 371 Ill. 174. Lyndon v. Trust Co. 310 Ill. App. 540; Shoup v. Alexander Motor Garage, 333 Ill. App. 46, 76 N.E. (2d) 547.

Before at the time of their appointment plaintiffs, who were temporary appointees, were required to fill out in their own handwriting small history cards. These contained, among other things, their addresses, birthplaces, former occupation, and date of birth. The information on these cards was copied onto a larger form which provided space for the future pertinent entries. These records are kept under the supervision of the Secretary of the Police Department. They are not Civil Service Commission records.

The Civil Service application forms recite that "Proof of false statements in any applications shall be grounds for *** discharge after appointment". The Police Commissioner on December 10, 1946, requested certification of fifty-one policewomen from the eligible list. The plaintiffs were among those certified and appointed December 16th. The Secretary of the Commission testified that after the

requisition was made the Commission had an investigation made by the Police Department before certification. This is not borne out by the record which shows, for instance, the report on Inez Champion dated December 30, 1946; on Norine Bergquist December 27th; on Kathryn Burke December 27th; on Jule Doyle December 28th; on Mary Lamson December 28th; and on Anna F. Flanagan December 28th. The reports were made on a Civil Service Commission form which calls for a full investigation of the character, habits, and reputation of the subject and warns the police that a thorough and careful investigation is wanted and that carelessness will result in charges against the investigator. The reports in the record disclose results favorable to the plaintiffs investigated.

The testimony shows that the Commission received written anonymous complaints that plaintiffs had falsified their ages in their application for the examination. The Secretary of the Commission called the Police Commissioner asking for information. The latter called the Secretary of the Police Department who furnished the information in writing to the Commissioner on December 31, 1946. He forwarded it to the Commission which thereupon commenced an investigation. Presumably the Commission requested the Commissioner to direct the plaintiffs to the office of the President of the Commission on January 10, 1947. They were not given a hearing. They were asked to submit proof of their ages in their applications.

January 23rd the Commission wrote the Police Commissioner reviewing generally the pertinent provisions of the Civil Service Law respecting certification, appointment and probation of the policewomen. It advised him that

during probation any action of removal "(because of misstatement of age or otherwise)" should emanate from him and that if he thought plaintiffs had misstated their ages, then he could discharge them subject to the Commission's consent and approval. The letter cited Section 10 of the Civil Service Act and suggested the Commissioner be guided in his actions as he saw fit. Apparently he saw fit to do nothing. He said that plaintiffs were very good policewomen, efficient and with no shortcomings and that he had "no order dropping them or suspending them" until February 21, 1947. On that date the Commission wrote him again referring to its letter of January 23rd. It wrote that it was obvious plaintiffs had misstated their ages and "disqualified themselves for the examination". It stated that not having been advised by the Police Commissioner of the action he intended to take "you are, therefore, directed to request authority" to discharge plaintiffs. The same day the Police Commissioner signed a letter addressed to the Commission seeking authority to discharge the plaintiffs because they had misstated their ages and "disqualified themselves for the examination". Authority was granted February 26, 1947, and the plaintiffs were discharged. The letter signed by the Commissioner was prepared by the Commission because, according to him, he neither requested nor made the investigation. He did not think he had power to make it and any irregularity was in the application and "they had charge of the application."

Defendants contend that plaintiffs were duly discharged in accordance with Section 10 of the Civil Service

Act, since they were discharged during the six months probationary period by the Police Commissioner who notified the Commission in writing of the reason for the discharge and obtained its consent and authority. Plaintiffs claim that the Commission acted illegally in conducting the character investigation after certification and that it usurped the power of the Commissioner by directing the discharges.

Plaintiffs had the burden of showing a clear right to the writ of mandamus. People ex rel. Elmore v. Allman, 382 Ill. 156. Since they were probationers they came within Section 10 of the Civil Service Act. Fish v. McGann, 205 Ill. 179. Section 10 of the Act gives power to the Department Head to discharge during probation with consent of the Commission upon notifying it in writing of his reason for the discharge. The Commission has only such power as is given it by statute. Gilbert v. Hurley, 336 Ill. App. 205. It operates under rules made by it under authority of Section 4 of the Act. These are as binding on it as though made by the Legislature. Lindholm v. Doherty, 102 Ill. App. 14, 29. Rule 4, Section 5 provides that in no case should a probationer be discharged until the appointing officer has been notified in writing of the approval of the Commission. Under Regulation 9, Section 1, the Commission was required to investigate the character of eligibles in advance of certification. We have pointed out that investigations in these cases were made after certification and appointment. Rule 2, Section 6 provides for dismissal from service for false statements in application but only after the appointee has been given an opportunity to be

heard in his own defense. It is not claimed that the dismissal of plaintiffs was under authority of this rule. Defendants denied that they discharged or brought about the discharges, of plaintiffs.

We think it is a fair conclusion from the record that the Commission did by indirection in these cases what it could not do directly. After certifying plaintiffs the Commision was faced with the knowledge that there was a discrepancy between the ages stated in the Police Department records of plaintiffs, except Norine Bergquist, and those in the applications. It initiated and conducted the investigation. Because of Rule 2, Section 6, it could not dismiss plaintiffs without a hearing. It had no power to discharge plaintiffs. This was the prerogative of the Police Commissioner. It invited him to discharge them in its first letter. He did nothing, being satisfied with the performance of their probationary duties. The Commission then directed him to discharge plaintiffs. The Commissioner presumably was not certain of the regularity of the proceeding. He asked the Commission to prepare the letter, requesting consent of discharges, because the irregularity occurred during the period of the Commission's jurisdiction.

It was the function of the Commission to determine the qualifications of the applicants for the examination. It would seem that the records under the supervision of the Secretary of the Police Department were suitable means to be used in the determination, except as to Norine Bergquist. The probationary period is to enable the Department Head to determine the competency, character, and

discretion of the probationer. Blake v. Lindblom, 225 Ill. 555. We do not say that lying about age or any other matter is not a defect in character. Neither do we say that previous lying would not be a reason for discharge under Section 10 of the Act. We do say that it is plain from the record that the reason given for the discharge of plaintiffs in the letter of February 21st was not the Police Commissioner's reason but that of the Commission. The Commission was not the Commissioner's agent in making the investigation. It initiated it and carried it through. Rather the Police Commissioner was the agent of the Commission to carry out its purpose of bringing about the discharges. The references in the exchange of letters to disqualification from taking the examination are meaningless, since the examination was taken and the results posted, unless considered in connection with Rule 2 , Section 6. For some reason the Commission did not proceed to dismiss plaintiffs under that rule. To accomplish its objective it used the Police Commissioner and his discharge power under Section 10.

Prior to 1941 the age limits fixed by the Commission for qualification for the examination were a minimum of thirty and a maximum of forty-five years. Thereafter, and at the time of the 1946 examination, the limits were twenty-five and forty years. There is a discrepancy in the records of plaintiffs', except Norine Bergquist, ages at the time of their temporary appointments and in their applications for the examination. If the previous record of their ages is correct, they were at the time of the examination over the maximum age limit fixed by the Commission.

The City argues that condoning plaintiffs' actions

will have an adverse effect upon the integrity of the Police Department. We do not approve or condone falsification of ages as a means of obtaining employment. People ex rel. Jendrick v. Allman, 396 Ill. 35. The Commission had the means of protecting the integrity of the Department. Rule 2, Section 6 empowered it to take steps before or after examination. It chose not to follow the Rule. The way to integrity in the Police Department is not through extra-legal procedures of administrative boards, no matter how laudable the objective or how serious the evil sought to be corrected. The way to integrity on the part of employees is through orderly legal procedures on the part of those in charge of employees. The Civil Service Act was intended to bring about efficiency, stability and security in public employment. We think the Commission acted arbitrarily and consequently the discharge based upon their action should not stand.

The writ properly issued. The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LEWE, J., CONCUR.

44514

EVANGELES DOROPOULOS, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT
PETER MILLER, Appellee.	)	OF COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action in equity to compel defendant to execute a five-year lease of premises used as a tavern in Chicago. Upon a report and supplemental report of a Master in Chancery, the Chancellor entered a decree dismissing the complaint for want of equity. Plaintiff has appealed. Defendant has cross appealed from a decretal order taxing half of the costs against him.

The premises involved are located at 1553 - 1555 East 67th Street, Chicago. They are known as the Continental Tavern. Defendant and his sons operated the tavern until plaintiff became tenant in 1940. For a few years prior to 1938 plaintiff had worked for defendant in the tavern as bartender.

In April, 1940, a five-year lease commencing May 1st, at $200.00 per month was entered into by plaintiff and defendant. At the expiration of that lease defendant remained as a tenant under two successive yearly leases at $250.00 per month. The term of the second of these expired April 30, 1947. In November, 1946, defendant gave plaintiff notice to vacate. This suit followed and the Chancellor stayed a forcible detainer action previously filed by the defendant.

Plaintiff alleged that when he made the first five-year lease in April, 1940, defendant orally agreed to a second five-year lease beginning May, 1945; that in consideration of plaintiff making extensive repairs and improvements in the premises for defendant, the oral promise was repeated December 17, 1944; that at that time defendant promised to retain a $500.00 deposit - made by plaintiff in 1940 for application to the March and April, 1945 rent - to be applied in March and April, 1950; that at the same time defendant agreed to sell plaintiff the tavern fixtures on a five-year plan, but thereafter stated that he did not want to "tie up" the property with a five-year lease and would grant successive yearly leases; that December 19, 1944, plaintiff signed the first yearly lease; that January 10, 1945, he purchased the fixtures and gave defendant a five-year chattel mortgage; and that January 15, 1946, plaintiff signed the second yearly lease. Defendant admitted the execution of these several instruments, denied making any oral agreements and averred that all promises between the parties were contained in the instruments.

In the original report the Master concluded that it was immaterial whether any oral conversations were had between the plaintiff and defendant. The Chancellor re-referred the case for a specific finding as to whether there was an oral agreement as alleged. In the supplementary report the Master found that there was no oral agreement to give plaintiff a second five-year lease and that, on the contrary, the written lease for a year was made in December, 1944. He further found that thereafter defendant promised orally to give plaintiff a lease so long as defendant owned

the building but that no such lease was given and that, on the contrary, another written lease was made. The Chancellor's decree approved the reports and followed the recommendations of the Master. The injunction staying the forcible detainer proceedings was vacated. Any statements or expressions of the Chancellor prior to the entry of the decree are not controlling. The decree speaks for itself.

The parties contradict each other upon the issue of the oral agreement for a second five-year lease. There is testimony by plaintiff's cousin corroborating him and by defendant's son corroborating defendant. There is testimony by a disinterested witness that plaintiff and his attorney told the witness in January, 1946, that plaintiff's lease expired in April, 1947, but that they could get a three-year lease from defendant if they had a buyer for the premises. Under this state of the evidence we see no reason to make findings different from those of the Master which were approved by the Chancellor.

There are circumstances in addition to his testimony which are favorable to plaintiff. Defendant did not return plaintiff's $500.00 deposit at the termination of any of the three leases. The defendant accepted a chattel mortgage for five years covering the sale of the fixtures. These circumstances, however, do not change our opinion that the decree is right in finding that there was no oral agreement proved of which plaintiff could compel specific performance. The proof was required to leave no reasonable doubt of the oral contract. (Anderson v. Anderson, 380 Ill. 488, 499). The decree found that defendant had satisfied the requirement of the Master's report by depositing $575.00 with the Clerk of the Court for plaintiff's benefit.

The chattel mortgage contained a provision that the fixtures should not be removed from the premises until completely paid for. The Master found that in view of this provision defendant must have intended plaintiff to remain and plaintiff must have expected to remain. He found, nevertheless, that in spite of the intention and expectation, and in spite of the fact that plaintiff had increased the tavern business from $20.00 to $100.00 per day, a promise to give a lease for more than one year would have to be in writing.

There is no merit in plaintiff's contention that the chattel mortgage satisfied the requirement of the Statute of Frauds. It was not an agreement to give a second five-year lease. In view of our conclusion on the question of an oral contract we need not consider the question of whether plaintiff performed under the contract. There is no merit either in the contention that a contract for a five-year lease should be implied from the terms of the chattel mortgage. The rule that where one party stipulates another shall do a certain thing, he impliedly obligates himself to do nothing to hinder the other from doing the act (Levy & Hipple Motor Co. v. City Motor Cab Co., 174 Ill. App. 20) does not apply. Another rule relied on by plaintiff does not apply here. That is that where the act required of one can only be done upon a cooperative act being done by the other contracting party, the law implies an obligation to do the cooperative act (Hudson Canal Co. v. Penn. Coal Co., 8 Wall. (U. S.) 276; 12 Amer. Jur. 766).

The chattel mortgage does not expressly provide for prepayments. Plaintiff, however, made a prepayment of $1,000.00. There was nothing to prevent his paying off the chattel

mortgage during the two yearly leases. Had he paid it off, he could move the fixtures if he wished. We see no basis, therefore, for application of the doctrine of estoppel. No case or rule cited would justify our precluding defendant from denying plaintiff had a lease after April 30, 1947.

Plaintiff argues from analogy of an executory purchase of real estate, where a purchaser under contract is permitted to remain in possession so long as he makes contract payments. He says that defendant here was vendor and plaintiff, vendee, under the five-year contract to purchase the fixtures. We have read the cases cited on this point. They might be analogous if defendant had sought to repossess the fixtures where there was no default. They have no application to the facts in this case.

Finally, we believe that the one-year leases are conclusive of the ultimate agreements of the parties after the first five-year lease, (Strehl v. D'Evers, 66 Ill. 77).

We see no reason to disturb the decretal order taxing half of the costs against defendant. The record shows that both master and Chancellor believed there were equities in plaintiff's favor but that he did not make the proof required in cases of specific performance. In view of the circumstances, we cannot find that the Chancellor abused his discretion in this respect.

For the reasons given the decree is affirmed.

DECREE AFFIRMED.

BURKE, P.J. AND LEWE, J. CONCUR.

44692

44719

ELI METCOFF and THOMAS MEIER, Appellants, v. NEWTON C. FARR, GEORGE G. BOGERT, HAROLD G. TOWNSEND, DAVID L. SHILLINGLAW and WARREN CANADAY, Trust Managers of the Flamingo Hotel Liquidation Trust, CHICAGO TITLE AND TRUST COMPANY, as Trustee under Trust No. 2150, and SAUL PLAST, Appellees.	CONSOLIDATED APPEALS FROM THE SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

These are actions by beneficiaries of the Flamingo Hotel Liquidation Trust against the trustee and trust managers. The first suit was to restrain a private sale of the property and for a judicial sale with competitive bidding at not less than a "guaranteed" bid procured by plaintiffs. After a hearing a decree was entered dismissing this suit. The second suit sought to have the acceptance of a bid for the property declared void and a judicial sale with competitive bidding. Defendants' motions to strike and dismiss were sustained and an order entered accordingly. Plaintiffs appealed separately from the decree and order. The appeals were consolidated in this court.

A different aspect of this trust was before this court in Metcoff v. Farr, et al., 330 Ill. App. 432. The property had been reorganized under federal law. Bondholders had exchanged their bonds for certificates of beneficial interest under an agreement of July 5, 1935, creating

a liquidation trust with defendant bank as trustee and the individual defendants as trust managers. The trust purpose was the sale and liquidation of the property and distribution of the proceeds as soon as practicable in the opinion of the trust managers. They were empowered to direct the trustee to sell to any person at any time subject to Article V. of the agreement with respect to notice to, and approval by, the beneficiaries. The original trust term of five years was extended to July 5, 1950. Unless previously sold, the property must be sold upon termination of the trust at public sale.

The trust managers notified the beneficiaries in writing August 6, 1948, of a cash offer of $875,000.00 for the property. They stated they regarded the offer as worthy of consideration; that it was subject to a mortgage payment, expenses and fees, and a brokerage commission of $27,250.00; and that the net proceeds of the sale per unit would be about fifty-four (0.54) cents. The beneficiaries were advised of an alternative plan devised by a group of beneficiaries, none trust managers, by which the beneficiaries might participate in a new trust or corporation to be organized to acquire ownership of the property beyond July 5, 1950. Under this plan beneficiaries could continue participation in the ownership through exchanging their present certificates or terminate their participation by selling their certificates for fifty-four (0.54) cents on the dollar. A card was enclosed with the notice upon which beneficiaries could indicate their objection to the offer of purchase, their approval or disapproval of the new trust or corporation plan and their willingness or unwillingness to sell their units at fifty-four (0.54) cents on the dollar.

On August 25, 1948, the day before the last day for filing dissents, Metcoff, owner of 3885 units out of a total of 1,302,800 filed suit. We shall state only the allegations which are pertinent and of which proof was offered. He charged that the notice did not disclose the names of the proposed purchaser or broker; that he had obtained an offer of $950,000.00; and that defendants had the duty to make a broader solicitation in order to obtain the maximum price. He prayed for restraint on the sale and for a competitive judicial sale with the $950,000 "guaranteed" price as the base or should it be determined that the beneficiaries have disapproved the sale, the court supervise competitive bidding with the highest bid to be submitted to the beneficiaries.

On September 9, 1948, Meier, owner of 4,000 units, joined Metcoff as plaintiff. He alleged that the original offeror had increased his offer to $1,100,500.00 and that plaintiffs had obtained an increased "guaranteed" bid for the same amount. On September 13th in a petition plaintiffs brought to the court's attention an increased "guaranteed" bid of $1,102,000.00.

Defendants answered the complaint stating that beneficiaries had disapproved the offer, that no sale could be made without a re-submission to the beneficiaries; that the court was without jurisdiction to order the sale and that the best offer for the property would be duly submitted. In a supplemental answer they averred receipt of a written offer of $1,102,500.00 and that the offer had been submitted to the beneficiaries. This offer was by Saul Plast. He was the

original offeror. In the notice to the beneficiaries Saul Plast was named as bidder and Theodore Plast, apparently Saul's brother, was named broker to whom commission would be paid at Real Estate Board rates. These names were not given in the August 6th notice. The managers stated in the notice that they considered the bid adequate and recommended approval. The bid would net beneficiaries about sixty-seven (0.67) cents per unit. The notice also stated that a three cent dividend had been declared payable September 30th.

October 8, 1948, the Chancellor heard evidence and entered the decree dismissing the suit. The question is whether he should have ordered a judicial sale as prayed by the plaintiffs.

Plaintiffs argue that defendants violated the trust agreement by failing to hold assembled meetings with reference to the transaction. The agreement provides that actions directing disposition of the property shall be taken only at assembled meetings. In matters of maintenance, operation, preservation and control there was no such requirement. The record in this case shows no action by the trust managers which required an assembled meeting.

Plaintiffs refer us to the August 6th notice for further evidence of misconduct. They point to the strange fact that the active trust manager, "one of the outstanding real estate men in Cook County", should regard as worthy of consideration a bid of $875,000.00 in one month and receive a bid from the same person in little more than a month later of $1,102,500. The bids presented by plaintiffs were conditioned upon the Chancellor conducting the sale. They were not submitted to

the defendants. After the suit was filed on August 25th and the dissents determined, sealed bids were taken. It was then that the original offeror bid $1,102,500.00.

We are not called upon to say whether the court could in a case of abuse of trust or incompetence assume jurisdiction so as to protect the beneficiaries. The Chancellor in this case was not in error in finding that abuse of trust or incompetence had not been proved. There is no danger to the beneficiaries shown by the record. What danger there may have been, had passed when, either through efforts of plaintiffs or otherwise, the original Plast offer was not accepted. There was no requirement in the agreement that the trust managers call for competitive bids in a pre-termination sale. Yet the record shows they did so in the second instance. Defendants were invested with broad powers in the agreement. So long as they acted properly, they, and not the Chancellor, had the power to direct the sale. Altschuler v. Chicago City Bank, 380 Ill. 137; First National Bank v. Bryn Mawr Beach Bldg. Corp., 333 Ill. App. 223. We think that the court entered the correct decree. In Savit v. Chicago Title & Trust Co., 329 Ill. App. 277, relied on by plaintiffs the Chancellor set aside a contract of sale and decreed a judicial sale. Only the disappointed contracting purchaser however, appealed and this court affirmed the order holding the contract to be beyond the trust powers of the managers. There was no proper challenge of the Chancellor's jurisdiction.

On November 5, 1948, plaintiffs filed an "Original Bill in the Nature of a Supplemental Complaint". Saul Plast was made a defendant. He and the other defendants filed motions to strike. Plast simultaneously filed a motion to dismiss. The Chancellor's order sustained the motions. Plaintiffs stood by the complaint and the suit was dismissed.

The substance of the complaint is that after the beneficiaries had approved the final Plast bid of $1,102,500.00 a broker named Seaman made a bid of $1,103,000.00 on behalf of one Silver; that coupled with the bid was a request for an opportunity to compete should there be a higher bid; that this bidder was invited to a meeting of the trust managers to be held October 29, 1948 and was asked to submit his highest bid and make an additional deposit; that the deposit was made but the trust managers refused to advise Silver whether there were bids higher than his; that the trust managers unjustly demanded that he make his bid without knowledge that he sought as to other bids; that his offer was rejected; and that the trust managers should have permitted him to compete with higher bids to the extent of an additional $20,000.00. Plaintiffs charge violation of trust duties through failure of the managers to do what Seaman and Silver wanted done.

We think the complaint failed to state a case for equitable jurisdiction. There is no basis for Seaman and Silver claiming the advantages they sought in bidding. How is plaintiffs' presentation of this claim consistent with their concern over the greatest benefit to the beneficiaries? What

right had either Seaman or Silver to the knowledge of what other bids had been made to the trust managers? The complaint shows only that the managers had taken sealed bids and submitted the highest bid to the beneficiaries and obtained approval. Seaman and Silver submitted a bid of $500.00 more. This difference of $500.00 is not enough to warrant the Chancellor's avoiding the acceptance of the Plast bid. There has to be order in bidding and we see no abuse in the discretion exercised by the defendants. There is no necessity for discussing other arguments made by plaintiffs. No reason is shown why Plast's bid should not be accepted nor why the Chancellor should have ordered a judicial sale. The Chancellor properly sustained the motions to dismiss.

For the reasons given the decree in case 44692 and the order in 44719 are affirmed.

DECREE AND ORDER AFFIRMED.

BURKE, P.J. AND LEWE, J. CONCUR.

44701

CITY OF CHICAGO, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
KREMA TRUCKING COMPANY, a corporation, Appellant.	)	OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a quasi criminal action based on an alleged violation of the amendatory zoning ordinance of 1942 of the City of Chicago. Defendant corporation was found guilty and fined $100.00 and costs. It appealed directly to the Supreme Court of Illinois. The case was transferred to this Court because no constitutional question was involved. (City of Chicago v. Krema Trucking Co., 401 Ill. 411).

The original complaint was filed May 12, 1947, against Joseph Krema, individually, and the defendant corporation. It charged a violation of the Chicago Municipal Code through "Failure to discontinue use of vacant lot for parking of trucks and trailers. District is zoned for 'Business use', in violation of Sec. 194-A-10."

The individual defendant was dismissed. Defendant corporation answered justifying its use as a lawful non-conforming use under Section 19, of the 1942 ordinance by reason of its permissive use, as either a motor vehicle terminal or garage, under the 1923 zoning ordinance.

The property involved was purchased in October, 1941, while the 1923 ordinance was effective. It is vacant and

located at the southeast corner of North Larrabee Avenue and West Menominee Street. It measures 250 feet on Larrabee Avenue and 125 feet on Menominee Street. Defendant purchased the property from the bankrupt estate of Hetzel & Company. That company had used the property for manufacturing, storage and trucking of sausage. Across the alley to the east, fronting on Mohawk Street was the Hetzel & Company powerhouse. Part of the foundation of this building remained on the Mohawk Street lot when this controversy arose in 1948.

On the vacant property when purchased were several dilapidated buildings which defendant had demolished and removed. Basement spaces which remained were filled and the vacant land levelled. Defendant placed a high wire fence about the property.

Before purchasing this property in 1941, defendant, which is engaged in the motor-freight transportation business, had also purchased, in 1936, from the Hetzel & Company estate the property across the street on the northeast corner. This property was improved with a somewhat deteriorated brick building which had been used by Hetzel & Company in the sausage business. Part of it was used as a stable for its dray horses. Defendant rehabilitated the structure and has used it since that time as an unloading and loading place for the freight transported by its motor trucks. Here unloaded freight is reloaded according to its destination and loaded trailers are parked in the vacant area across the street to await a driver and truck. They are parked there sometimes for hours and sometimes for several days. There

was testimony that the vacant property was used in March of 1947 and previously for the storage of motor trucks and trailers in a bad state of disrepair, some of which was "junk". There is also testimony that as much as sixteen yards of crushed stone, many metal barrels, and a quantity of lumber had been stored on the property. We think it is quite fair to say, however, that the principal use of the vacant property was as an adjunct of defendant's terminal across the street. In transferring the case to this Court, the Supreme Court said on page 415: "The evidence clearly shows that the use made of the tract was as an adjunct to the freight terminals and no other". This was the use to which the property was being put when this complaint was filed.

When defendant purchased both of these properties, the district embracing them was classified under the 1923 zoning ordinance as "Commercial". Under the amendatory ordinance of 1942 it is classed as "Business". The use of the property by defendant does not conform to the 1942 ordinance. Section 19 of that ordinance, however, provides that nonconforming uses which were lawful under the prior ordinance could be continued as lawful nonconforming uses. The question is, therefore, whether defendant's use came within the "Commercial" use established in the 1923 ordinance.

Defendant in its answer set up the defense of res judicata or estoppel by verdict to bar the present action. This alternative defense was based on a prior suit against Joseph Krema, individually, for the same violation in the use of the same property. Krema was found not guilty and

was discharged. Defendant contends that since Krema is the largest stockholder and conducts the business as active head of the corporation, there is a substantial identity of parties in the prior and the instant action. Krema was sued personally, not as a corporate officer in the prior suit and the corporation was in no wise legally involved. We think the rule announced in the (City of Elmhurst v. Kegerreis, 392 Ill. 195,) should not be extended to cover this case. Krema's relationship to the corporation is different from that of the Superintendent of Building Construction of the City of Elmhurst to that city, and is different from that of Trustee Hummel to his predecessor in (Hummell v. Equitable Insurance Society, 151 F. (2nd) 994). Defendant would not have been bound had a judgment assessing a fine against Krema been entered in the first case (Kessler v. Fligel, 269 N. Y. S. 664, Aff'd. 195 N. E. 176). There was no privity between them. It cannot avail itself of a judgment in his favor. Neither the doctrine of res judicata nor estoppel by verdict is applicable. We do not consider Board of Education v. Crilly, 312 Ill. App. 16, nor Bauer v. The Ray Schools - Chicago Inc. #44368, recently decided by the second division of the Court, applicable to the factual situation in the instant case.

The next question is whether defendant's use of the property prior to December, 1942, was lawful. If it were, then it is lawful now as a nonconforming use under Section 19 of the 1942 ordinance. It is conceded that the 1923 ordinance did not expressly permit the use of the property for a motor truck terminal. Defendant says that that use is

implied in the ordinance under "(Section 8,) Commercial District", in provision "C 1 use" for "Railroad or water, freight station or storage, team, loading or unloading track or private track, or wharf,".

Those uses under the 1942 ordinance are classed as "Manufacturing". The district embracing the property here is classified under the 1942 ordinance as "Business".

Street cars operate on Larrabee Avenue. Across the street on Larrabee Avenue from defendant's vacant property is a wooden shed used as the office of the Donovan Trucking Company which operates two trucks. Across on Larrabee Avenue from defendant's building is the Hahn Trucking Company, the operator of four or five trucks. It appears from the record that truck traffic is heavy on Larrabee Avenue as well as on Menominee, Mohawk and other nearby streets. There is testimony of people living in the vicinity of the property with respect to its use in March, 1947, and previously. In view of what the Supreme Court of Illinois said as to the use of the vacant property and in view of the question involved, we deem the testimony irrelevant. It is not contended that if legal, defendant's use of the vacant property constituted a nuisance. City of Chicago v. Reuter Bros. Iron Works, Inc. 398 Ill. 202, 208. In this connection we should point out that the question of constitutionality of the ordinances involved has been eliminated from the case by the Supreme Court. We are not required to consider questions concerning the validity of the ordinance, reasonableness of the classification and the like. There is only the question of the trial court's construction of the pertinent portion of Section 8 of the 1923 ordinance.

We think that construction of zoning ordinances should be reasonably liberal in favor of the free use of the property by the owners. Defendant paid $55,000.00 in 1935 for the improved property at the northeast corner of Larrabee Avenue and Menominee Streets. It paid $15,000.00 for the vacant lot in 1941. Presumably when these properties were purchased, defendant's representative consulted the 1923 zoning ordinance then in effect. The previous use to which the property had been put was known. The purpose for which the properties were obtained was to operate the motor-truck freight business. The ordinance of 1923 did not expressly cover defendant's business. A City zoning map of the area in possession of the Zoning Department showed the northeast corner of Menominee and Larrabee Streets and across the part of the map designating that property was printed "Motor Truck Freight Terminal". The supervisor of records of the Zoning Department testified that the words were placed on the map before 1942. Under the 1923 ordinance railroad or water freight stations were permissive uses in the district. We think a reasonable construction of the 1923 zoning ordinance compels the conclusion that a motor-truck freight terminal was a lawful use in the district by implication. The attorney for the City in oral argument stated that this construction runs counter to the marked evolution of the district to a higher use. It is true that the 1942 ordinance has changed the classification of the east side of Larrabee Avenue to a "Business" district. In its brief, however, the City says that this change was not one of substance. It is our view that a gross injustice would be done to defendant corporation under the circumstances in this case by any other conclusion than that the trial court erroneously construed the 1923 ordinance.

In February, 1946, defendant applied to the Board of Zoning Appeals for a variation. The City argues that this application admits that defendant's present use is non-conforming and that it should be precluded from now contending otherwise. The action against Joseph Krema individually was begun February 8, 1946. It is likely that prior thereto there was an inspection of the premises and notice of violation. It is likely also that defendant's application for variation arose out of these preliminaries. Defendant may have believed that a variation of the requirements of the 1942 ordinance was an easier alternative than judicially establishing the lawful use under the 1923 ordinance. We see no reason why estoppel should operate against the defendant by reason of the application.

The judgment is reversed, and the cause remanded with directions to enter judgment for defendant and against plaintiff.

REVERSED AND REMANDED.

BURKE, P.J. AND LEWE, J. CONCUR.

44722

44723

CITY OF CHICAGO, Appellee, v. JEAN HANSEN and MARTIN OCHS, Appellants.	CONSOLIDATED APPEALS FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

These are quasi-criminal actions which charge that defendants "Did make or aid in making an improper noise, riot, disturbance, breach of peace, or diversion tending to a breach of the peace, with (sic) the limits of the city". Chapter 193, Section 1, Sub-section 1, Chicago Code 1939. The defendants were arrested without warrants by police officers of the City. Separate complaints, sworn to by a police officer, were filed with leave of court. Upon demands by the defendants the cases were tried together by a jury which returned separate verdicts of guilty. Fines of $200.00 were imposed and judgments entered therefor by the trial court. Defendants have appealed and on motion the appeals were consolidated in this Court.

Before trial defendants' motions to suppress the evidence, on the grounds that their arrests were illegal being without warrant, were denied. At the close of the plaintiff's case and at the close of defendants' case, defendants' motions for directed verdicts were denied. Defendants' contend that the court committed error in these several rulings.

The defendants were arrested about 11 a.m, July 8, 1948 in Room 1207 of a hotel in the City of Chicago. With them at the time was James Barsella who died before the trial. Barsella and Ochs had been at court that morning and had gone to the defendant Hansen's room. When the arrest was made, Barsella was in shorts and socks, Ochs was in bed under the covers, nude, and defendant Hansen was sitting on the bed in a bathrobe or negligee. The arrest was made without a warrant. The officers had gone to Room 1207, heard nothing at first, stood there "for a minute or two" and heard two men and a woman talking in the room. After they had stood there about five minutes, they heard a woman say, "Jimmie! Jimmie! Stop! You are killing me";"Jimmie! Don't! It is hot as fire." or similar words. The policemen thereupon knocked at the door which was opened at once by Barsella who recognized the policemen and upon their inquiry as to what was going on in the room, invited them in. They found the situation as described herein above. The police searched the room. They saw no instrument or object in the room which was "hot" but saw cigarettes and a cigarette lighter. Defendant Hansen had no burns on her. They found no weapons. The defendant Hansen was not married to either of the men with her, according to the conversations related by the policemen who said that Barsella told them she was his girl.

The defendant Ochs testified that after he and Barsella left court July 8th, the latter called defendant Hansen who said she was going to work; that they went to her room; that she was bathing; that Ochs undressed and went to

bed and Barsella ordered coffee; that someone telephoned the room and asked if Barsella was there; and that "three minutes later" the police came in and "threw the room upside down". Ochs said that defendant Hansen did not speak the words attributed to her. There was testimony by the officers that they were told, upon their inquiry, that there was no trouble in the room, that a post-court celebration was in progress and the occupants of the room were waiting for the bellboy to bring ice for some drinks. There was also testimony that defendant Hansen had resided in the hotel five months prior to arrest and that her reputation as a peaceful, law-abiding citizen in the hotel was good.

The transcript of proceedings indicates that the jury found defendants not guilty on a second charge which is not specified by the record. Defendants did not ask that the charges against them be more particularly defined and they were presumably satisfied to proceed to trial together on the complaints made. Sufficient proof of any one or more of the component parts of the charge in the complaint should sustain the verdicts. City of Chicago v. Meyers, 183 Ill. App. 345.

At the outset it is well to point out that we are of the opinion there is no proof in the record of a breach of the peace or diversion tending to a breach of the peace and certainly none of riot. The City contends the two defendants were properly convicted of the offenses of "improper noise and disturbance". We think City of Chicago v. Terminiello, 400 Ill. 23 (cert. granted by the U. S. Supreme Court Dec. 13, 1948) is inapplicable.

We disagree with the City that it is immaterial whether the defendants' acts were committed in private or public if it means that the acts need not affect the public. We think that the City was required to prove the "improper noise" was such as was likely to disturb the public and that the "disturbance" did disturb the public. People v. Monier, 280 N. Y. 77, 19 N. E. (2) 789; City of Chicago v. Murray, 333 Ill. App. 233. We have been referred to no case where privately made improper noises or disturbances have been sufficient upon which to convict persons in quasi-criminal cases. The case of Garven v. City of Waynesboro, 15 Ga. App. 633, 84 S. E. 90, cited by the City is not helpful. Little light has been shed for an understanding of the vague offense of making an "improper noise". Furthermore we believe the three policemen who appeared to have been the only ones affected cannot be considered the public. They were listening at the door of a private room. Presumably they were seeking to apprehend someone whom they knew or had reason to believe was in the room. They had no warrant and we assume had no knowledge of any crime which the person or persons sought had committed. If they had, we assume the defendants would not have been charged as they were.

The arrests were made for the alleged offenses, committed in the presence of the officers. The offense was not in what they saw but what they heard. The specific charges are based on the words spoken by the defendant, Hansen. There is no evidence of any other alleged "improper noise" or "disturbance". Officer Kush heard her, "Say as though in pain"; Lieutenant Hackett heard her, "Say"; and Officer Glynn

heard, "Some screaming and shouting. We heard a woman's voice say * * *." This is the only relevant testimony of the offenses charged. What the officers found later was not in their presence at the time they heard the words. The situation they found may have had an explanatory bearing retrospectively on the words they heard. It had no bearing on what they heard when they heard it. The offense of "improper noise", at least, had nothing to do with the ideas conveyed. It had to do with the sounds made. The testimony of Officer Glynn alone could conceivably be said to tend toward proof of "improper noise". In a quasi-criminal case however we are not prepared to hold that what he said he heard in his situation at the time tends to prove what would be an "improper noise" to the average member of the public.

There was no proof that the defendants made a "disturbance" except that of the police officers as to the words heard. There is no proof that the police officers or anyone else in the hotel was disturbed. Situated as the policemen were, listening at the door, we believe that the jury, if it so found, was not justified in finding that they were disturbed. Reasonable inferences of "disturbance" of the police officers is not warranted from the testimony of what they did upon hearing the words.

For the reasons given we believe the trial court erred in denying the motions for directed verdict. The judgments are reversed and the causes are remanded with directions to enter judgments for defendants and against the plaintiff.

REVERSED AND REMANDED.

BURKE, P.J. AND LEWE, J. CONCUR.

337 I.A. 664

44679

BIESSIE BERGER, Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
BEN CHEMERS, Appellee.	)	OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a forcible detainer action instituted by plaintiff against defendant to recover possession of an apartment in the 23 apartment building owned by plaintiff at 4858 West Washington Street, Chicago, Illinois. The trial court made a finding in favor of defendant and entered judgment accordingly. Plaintiff appeals.

Defendant occupies a 5-room apartment with his wife, two children, and his mother-in-law. In another part of the building plaintiff's son, Dr. Samuel Berger, lives in a 4-room apartment with his wife and two children.

The principal question presented is whether plaintiff seeks possession of defendant's apartment for the use and occupancy of her son, Dr. Berger, "in good faith" under the provisions of the Housing and Rent Act of 1947, Title 50 U. S. C. A. Sec. 1899(a) as amended in 1948.

Plaintiff testified that she wants possession of defendant's apartment for the use of her son, Dr. Berger, because he assists her in the management of the building, "banks" her money, "makes out all reports," and for the further reason that defendant's apartment is "in the same hallway and has five rooms."

Plaintiff admits that she made an overcharge of rent for a period of three months; that afterward the Office of Price Administration directed plaintiff to refund the excess rent to defendant and imposed upon plaintiff a penalty in the sum of fifty dollars.

Defendant testified that at the time he leased the apartment in controversy, April, 1946, he had a conference with plaintiff and her son Harry Berger who then occupied the apartment; that plaintiff told defendant he could obtain the apartment if he would buy her son's furniture; and that defendant bought plaintiff's son's furniture and paid therefor the sum of $1,175, and that the furniture was actually worth $300 or $350.

Defendant further testified that after he purchased the furniture he asked plaintiff for a lease and that she told him "I would not have to worry as long as she owned the building"; that he was never repaid the amount of the rent overcharge by plaintiff, and that plaintiff asked him "to enclose a five-dollar bill with every $65 check I gave her."

It is uncontroverted that Dr. Berger knew his brother Harry was going to vacate the apartment here involved before it was leased to defendant. Plaintiff contends that the testimony of defendant with respect to the violation of the rent regulations and the sale of household furnishings of plaintiff's son is inadmissible. We think plaintiff's position is untenable. These facts and circumstances were admissible for the purpose of showing plaintiff's motives in instituting the present action, and therefore were properly

considered by the court in determining the question of fact whether defendant was seeking possession of the premises in good faith. (Nofree v. Leonard, 327 Ill. App. 143.)

The burden of proving good faith is upon the plaintiff. (Barsanti v. Jacobsen, #44676 filed March 16, 1949, 1st Dist. App. Ct.; Mikkelsen v. McDonald, 333 Ill. App. 518; Scharf v. Waters, 328 Ill. App. 525; Nofree v. Leonard, 327 Ill. App. 143.)

In our opinion the evidence is sufficient to support the court's findings. The trial court who heard and saw the witnesses was in a better position than this court to determine the credibility of the witnesses and the weight to be accorded to their testimony.

For the reasons assigned, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

44698

ANNA ETKESON, Appellee,	)	
	)	APPEAL FROM MUNICIPAL
v.	)	
	)	COURT OF CHICAGO.
ADYEE DUNAWAY and SALLIE FRANKLIN, Appellants.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought separate forcible detainer proceedings against the two defendants. By agreement of the parties the causes were consolidated for the purpose of trial. At the close of plaintiff's case the court instructed the jury to return a verdict in favor of plaintiff, and motions for a new trial and in arrest of judgment having been overruled, the court entered judgment on the verdict. Defendants appeal.

Defendants were tenants in premises located at 3247-49 South Michigan avenue in Chicago which were owned by plaintiff, who claimed possession for the purpose of installing fire escapes on the outside of the building in order to comply with directives of the City of Chicago. It is her contention that these repairs could not be made with tenants in possession. One of the defenses interposed was that there was a lack of good faith on the part of plaintiff in instituting these proceedings, since the installation of fire escapes could be made without dispossessing the tenants. At the close of plaintiff's case defendants offered to prove by two expert witnesses that the repair or installation of fire escapes on the outside of the building could

be made while the tenants were in possession. However, the court overruled the offer, indicated that he had heard enough evidence, and directed the verdict. We think the proffered evidence was competent to establish one of the defenses interposed. We agree that fire prevention measures and ordinances should be fully complied with; but the court should have allowed the jury to pass upon the question of fact whether the eviction of defendants was necessary to carry out the repairs required.

Plaintiff fails to discuss any of the grounds urged for reversal in defendants' brief, and merely confines herself to the contention that defendants were negligent in four designated respects in making up the abstract of record. We find, however, that the abstract presented sufficiently sets forth the complaints of the consolidated actions, the verdict of the jury pursuant to the court's instruction, the rulings on the motions for a new trial and in arrest of judgment, so much of the judgment as is necessary for the enlightenment of the reviewing court, and the notice of appeal. Whatever deficiencies may appear in the abstract are purely technical and are remedied by the filing of an additional abstract of record by plaintiff. In the recent case of People v. Grabs, 373 Ill. 423, the court refused to dismiss the appeal on technical grounds, saying that such action "would defeat the announced purpose of section 4 of the Civil Practice act which provides that the act shall be liberally construed to the end that controversies may be

speedily and finally determined, according to the substantive rights of the parties," and added that "ordinarily, the appellee must supply an additional abstract if he deems appellant's abstract insufficient. He cannot obtain the dismissal of the appeal, except for flagrant disregard of the rule." To the same effect see McCarthy v. Meyer, 298 Ill. 620, and Logemeyer v. Fulton State Bank, 313 Ill. App. 270. There is no validity to the contention of plaintiff that the appeal should be dismissed upon the grounds urged.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded with directions that defendants be allowed to interpose such valid defenses as may be available to them, and that a trial be had on the merits.

Judgment reversed and cause
remanded with directions.

Sullivan, P. J., and Scanlan, J., concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A. D. 1940.

General No. 9624 Agenda No. 3.

B. F. FEYERABEND,
Plaintiff-Appellee,
-vs-
HARRY C. HANNA,
Defendant-Appellant.

Appeal from
County Court of
Jersey County.

DADY, P.J.

Plaintiff F. F. Feyerabend brought this action in distress for rent alleged to be due him from the defendant Harry C. Hanna, for rental of a farm owned by Feyerabend. Defendant's answer alleged the rent had been paid. Defendant filed a counter-claim for $500. Plaintiff's answer thereto alleged that nothing was due on the counter-claim, and alleged as an affirmative defense that since the commencement of the suit plaintiff had commenced an action in forcible entry and detainer in Justice Court against defendant, and that during the pendency of such last suit plaintiff and defendant had compromised and settled all of their accounts, and that as a result thereof nothing was due the defendant from the plaintiff. Defendant's reply denied such compromise or settlement.

The sufficiency of the pleadings is not questioned.

The case was tried on the merits before a jury and the jury returned a verdict in favor of the plaintiff-counter-defendant,

Abstract

assessing "the plaintiff's damages at none and costs of this suit." Judgment was entered on such verdict in favor of plaintiff.

Defendant-counter-claimant appeals.

No objection is made as to any ruling of the trial court on the admission or rejection of evidence, and no objection is made to the giving or refusal of any instruction.

There was evidence fairly tending to prove that all of the claims of the plaintiff and of the defendant had been compromised and settled during the pendency of such forcible entry and detainer suit.

We have carefully read the record and it is our opinion that we cannot properly say that the verdict is against the manifest weight of the evidence.

Therefore the judgment appealed from is affirmed.

Affirmed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A.D. 1949

No. 9650

Agenda No. 1

337 I.A. 665

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff - Defendant in Error, vs. ZADA RUSSELL, Defendant- Plaintiff in Error.	Writ of Error from the County Court of McDonough County. ~~Criminal Number 9[illegible]~~
~~ZADA RUSSELL, Plaintiff in Error, vs. PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.~~	

O'Connor, J.

By this writ of error defendant, Zada Russell, seeks to reverse a judgment of the County Court of McDonough County sentencing her to the Illinois State Reformatory for Women at Dwight, Illinois, upon the finding of the court that she was guilty of the offense of keeping a house of ill-fame.

The Information upon which Zada Russell was tried contained three separate counts.

The first count charged the defendant with keeping a house of ill-fame. The second count charged her with maintaining a place for the practice of prostitution and lewdness, and the third count charged the defendant with keeping a common ill-governed and disorderly house to the encouragement of idleness, gaming, drinking, fornication or other misbehavior, all in violation of Section 162 of Chapter 38 of the Revised Statutes of the State of Illinois.

The defendant orally waived a jury, the case was tried by the court, and the defendant found guilty and sentenced to a one-year term at the Illinois State Reformatory for Women at Dwight, Illinois.

Defendant contends that the Information filed herein is vague and insufficient and does not apprise the defendant sufficiently of the offense charged against her, and that a subsequent acquittal would not bar a future prosecution.

The Information is in the language of the statute, which is sufficient. It sets forth in particularity the date of the offense, the description and address of the house alleged to have been maintained by the defendant on the date in question, and any acquittal on the charges as laid would most certainly bar any future prosecution for the same offense. In addition, upon the defendant's motion and an order of court, the People furnished a bill of particulars.

The purpose of a bill of particulars is to provide more particular averments in order to enable the defendant to understand the nature of the charges or to prepare his defense. (People v. Sims, 393 Ill. 239.) The bill of particulars furnished in this case did fully and sufficiently apprise

the defendant of the charges against her, if the Information coud in any way be called insufficient to so inform her. It is not necessay that the details of the acts relied upon as a viclation be recited in th Information.

Defendant also contends that the record does not show affirmatively that she entered a separate plea to each count of the Information and that the finding of guilt should indicate as to which coun of the Information the defendant was found guilty. In support of her contention she cites the case of People v. Friedman, 223 Ill. App. 149. The rule laid down in the case cited by the defendant does not apply. In that case the defendants were found guilty under the second count of an indictment, the same being a misdemeanor count. The record failed to show that the defendants entered any plea to that count and the court held "that there was no issue before the court and the judgment of conviction could not stand." In the present case the record shows that the defendant was arraigned and entered a plea of "not guilty". Such a plea is a plea of not guilty to the Information as a whole, and the record shows that the trial proceeded on the issue made up by that plea.

The Information filed herein charges one offense in three alternatives - one alternative in each of the three counts. It has long been the approved practice to charge, by several counts, the same offense as committed in different ways or by different means, to such an extent as will be necessary to provide for every possible contingency in the evidence.

A general plea of not guilty puts in issue the question of the defendant's guilt to the one offense in either or all of the alternatives, and a finding of "guilty of keeping a house of ill-fame as charged in the Information herein" is entirely proper and it is not necessary that the record show as to which count of the Information defendant was found guilty. In the case of People v. Bailey, 391 Ill. 149, the court at page 154 said:
"The logical effect and meaning of a general verdict finding the defendant 'guilty in manner and form as charged in the indictment' are that he is guilty in manner and form as charged in each count of the indictment."

The three counts in the Information in this case are not inconsistent with each other. The defendant was not injuriously affected by the fact that the court did not indicate as to which count of the Information the defendant was found guilty. (People v. Diekelmann, 367 Ill. 372.)

In the instant case it makes no difference whether the defendant is convicted on one, two or all three of the counts in the Information, the punishment is the same.

The defendant further agrees that the proof does not show the commission of any offense in McDonough County. There appears to be sufficient proof that the offense was committed in McDonough County. The witness Ernest McCall testified that he lived at 314 West Calhoun Street in Macomb in McDonough County, and that the defendant lived at 332 West Calhoun Street during June and July of 1948; that said house occupied by the defendant was four houses west of his house on the same side of the street. This proof is amply sufficient to establish the venue. In addition to this proof all of the witnesses testified that the house in question was located at 332 West Calhoun Street in the City of Macomb, Illinois. The court will take

judicial notice that a particular city, village or town is in a certain county. It is sufficient if the evidence as a whole, leaves no reasonable doubt that the act upon which the charge is based was committed at the place laid in the information. (People v. Golub, 333 Ill. 554.)

The defendant further contends that the material allegations of the complaint were not proved and that the court permitted improper introduction of evidence. We cannot subscribe to this contention. Defendant herself testified that on July 11, 1948 she was renting the premises located at 332 West Calhoun Street. Four witnesses testified that on July 11, 1948, they went to the house located at 332 West Calhoun Street; there they saw the defendant, talked with her, and each one of them had intercourse with one Elizabeth Keel, for which they each paid the defendant, Zada Russell, the sum of three dollars. One other witness, George Nebergall, testified of his presence in the house at the time, and that the other four witnesses did pay Zada Russell three dollars each and went up stairs with Elizabeth Keel. He did not go upstairs at any time. Elizabeth Keel was called as a court's witness, and testified she was a visitor at the home of the defendant Zada Russell, at 332 West Calhoun Street, from June 25, 1948 until July 14th of the same year.

Certainly that evidence, although the acts were denied by the defendant on the witness stand, is conclusive that the two story frame house located at 332 Calhoun Street in Macomb, Illinois, was a house of ill-fame on July 11, 1948, according to the accepted meaning of the phrase. It is also conclusive that the said house was kept by the defendant, Zada Russell.

We must assume that the trial judge considered only properly admitted evidence on the part of the People, and the record discloses that there was no evidence produced on the part of the defendant that was refused. The judge heard and saw the witnesses and had advantages which this court does not have in judging the weight which should be given the testimony.

Considering all the facts and circumstances revealed by the record in this case we are impressed, as was the trial court, that the guilt of the defendant Zada Russell was proven beyond a reasonable doubt.

We are of the opinion that the record contains no reversible error and the judgment of the County Court of McDonough County is therefore affirmed.

Affirmed.